Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

TIPP-IT, INC., A Nebraska Corporation,

Petitioner,

vs.

MARTIN J. CONBOY, City Prosecutor
Omaha, Douglas County, Nebraska,

Respondent.

On Petition For A Writ Of Certiorari To The Nebraska Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Was the Nebraska Supreme Court's refusal to articulate a contemporary community standard and the reliance on expert testimony to determine whether the allegedly obscene material lacked serious artistic value violate the First Amendment to the United States Constitution.

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OPINIONS BELOW

The Nebraska Supreme Court's Opinion is reported at 257 Neb. 208, and 596 N.W.2d 304 (1999).

JURISDICTION

The judgment petitioner seeks to have the court review was entered on July 9, 1999. There is no applicable order for rehearing. No order has been entered extending the time in which to file the petition for writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

First Amendment to the Constitution of the United States

> **Religious and political freedom.**
>
> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Neb. Rev. Stat. §25-1218 provides:

> Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are presumptive evidence of facts of general notoriety or interest.

Neb. Rev. Stat. §28-807(10) provides:

> Obscene shall mean (a) that an average person applying contemporary community standards would find that the work, material, conduct, or live performance taken as a whole predominantly appeals to the prurient interests or a shameful or morbid interest in nudity, sex, or excretion, (b) the work, material, conduct, or live performance depicts or describes in a patently offensive way sexual conduct specifically set out in sections 28-807 to 28-829, and (c) the work, conduct, material, or live performance taken as a whole lacks serious literary, artistic, political, or scientific value.

Neb. Rev. Stat. §28-807(15) provides:

> Sexual conduct shall mean acts of masturbation, homosexuality, sodomy, sexual intercourse, or prolonged physical contact with a person's clothed or unclothed genitals, pubic area, or buttocks or, if such person is female, breasts.

Neb. Rev. Stat. §28-820 provides:

> Any person who exhibits, sells or distributes, or is about to exhibit, sell or distribute or has in his or its possession with intent to sell or distribute, or is about to acquire possession with intent to exhibit, sell or distribute, any work, material, conduct or live performance shall, if such person has genuine doubt as to the question of whether such work, material, conduct or live performance is in fact within the terms and provisions of sections 28-807 to 28-829, have the right to bring an action in the district court for declaratory judgment under the Uniform Declaratory Judgments Act against the appropriate chief law enforcement officer of the city,

> village or county in which the work, material, conduct or live performance is located or is intended to be disseminated, distributed, or exhibited, for a judicial determination as to whether or not such work, material, conduct or live performance is obscene. Any such action may be consolidated with a pending action brought under the provisions of sections 28-816 to 28-818, and the defendant in any action brought under this section may seek a declaratory judgment or request a temporary restraining order or an injunction therein in accordance with the provisions of sections 28-816 to 28-818.

Neb. Rev. Stat. §82-318(2) provides:

> Art shall mean the conscious use of skill, taste, and creative imagination in the production of aesthetic objects.

Neb. Rev. Stat. §82-403 provides:

> Art shall mean the conscious use of skill, taste, and creative imagination in the production of aesthetic objects and may include sculpture, painting, photography, prints, tapestries, weavings, film, videotape, folk arts and crafts, graphic design, pottery, architectural sketches, and other items considered to be art.

BASIS FOR JURISDICTION

Petitioner in its initial Petition for Declaratory Judgment (App. 44) sought a declaration that the material in question was not obscene and thus protected by the First Amendment. The district court in its order (App. 25) determined that certain of the materials at issue were

obscene and not entitled to First Amendment protection. The Nebraska Supreme Court in its opinion affirming the district court (App. 22) also concluded that the materials at issue were obscene and not entitled to First Amendment protection.

STATEMENT OF MATERIAL FACTS

This appeal raises a significant First Amendment issue concerning the determination that a number of works of art displayed at a gay bar created by gay artists were obscene within the meaning of Nebraska's obscenity statute, *Neb. Rev. Stat.* §28-814 (Reissue 1989).

In addition, the First Amendment issue involved is ancillary to the issues presented in *Erie, Pa. v. Paps A.M.*, No. 98-1161 and *United States v. Playboy Entertainment Group*, No. 98-1682, both of which are scheduled for oral argument during this Court's current term.

Tipp-It, Inc. ("Tipp-It") is the owner and operator of a gay bar in Omaha, Douglas County, Nebraska. After a fire inspection done in connection with remodeling, the Omaha Police Department received a complaint about possible pornography. The Omaha Police Department inspected the basement of the bar and seized three works as obscene.

Pursuant to *Neb. Rev. Stat.* §28-820, Tipp-It filed a declaratory judgment action in the District Court of Douglas County, Nebraska. After a trial, the Honorable Michael W. Amdor determined that the three works

seized were obscene within the meaning of Nebraska's obscenity statute.

Tipp-It appealed to the Nebraska Supreme Court which affirmed the decision of the District Court with respect to the determination that the three works were obscene.

STATEMENT OF THE CASE

Factual Statement of The Case

Tipp-It, Inc. operated a bar at 1715 Leavenworth, Omaha, Nebraska under the name and style, The Run Bar. (12:15-22; 31:15-20). Tipp-It, Inc. operated the bar since August 24, 1994. (32:19-21). It caters to a gay clientele. (11:13-25; 98:1-4).

It has a liquor license that covers the address from 1713 to 1715 Leavenworth, including the main floor, a loft area, and the basement. (36:18-25; 38:13-25).

The basement has a full bar, and was utilized on Thursday, Friday, Saturday and Sunday to individuals over twenty-one from 8:00 p.m. until 1:00 a.m. (39:4-5; 41:1-16). Although Tipp-It, Inc. had an after hours dance permit, the basement was not used for after hours dancing. (41:17-21). The primary activity at the Run Bar on Thursday, Friday, Saturday and Sunday nights consisted of socialization. (42:1-25; 43:1-20).

When first entering the Run Bar, one makes a little turn, goes through another door and enters the main bar. There is a window by the main entrance to the bar. There is no window in the basement. An individual or member

of the public passing by the Run Bar on Leavenworth Street would not be able to see or look at the works in question in the basement. (13:4-25; 14:1-6; Exs. 23 and 24; 6; Box).

Terry Tippit was Vice President of Tipp-It, Inc. (31:11-12). He acquired the art works in question (E1-E22:6, Box) from a friend and customer who had lived in San Francisco for a period of time. The art works were created by four artists with the majority of the pieces created by Snowflake, a well known gay artist whose works were sold worldwide. (98:9-24). The works displayed consisted of various mediums, acrylic on canvas, oil on canvas, watercolor, pencil art, pen art, and chalk drawings. (100:1-11).

Exhibit 1 (E1:6, Box) was pen art done by an artist that was still alive who also published his works in *Easy Rider Magazine*. (100:13-19).

Exhibit 2 (E2:6, Box), pencil art was created in 1986 by Cirby, a well known deceased artist in the gay community. (101:6-12).

Exhibit 3 (E3:6, Box) was created by an artist with the first name of "Mark". The painting was symmetrically perfect regardless from which angle it was viewed. Although not clear in the photograph, there was a separation between the bodies in the actual picture and there was no penetration depicted on this art work or any other art work that was exhibited. (101:12-25; 102:1-4).

Exhibit 4 (E4:6, Box) is a scene from the Ambush Bar in San Francisco. (102:6-13).

Exhibit 5 (E5:6, Box) is another work by Snowflake. (102:15-17).

Exhibit 6 (E6:6, Box) is the scene of a pool table as seen in the Ambush Bar and goes with Exhibit 4. (102:20-25).

Exhibit 7 (E7:6, Box) is a self-portrait of the artist. (102:15-18).

Exhibit 8 (E8:6, Box) is pen art done by Noell, a famous gay artist who recently passed away. (102:20-25; 103:1-2).

Exhibit 9 (E9:6, Box) is a work by Snowflake depicting a mermaid man and man in the moon. (103:2-8).

Exhibit 10 (E10:6, Box) is a self-portrait of the artist – Snowflake and Stonehenge, an oil on canvas work. (103:9-14).

Exhibit 11 (E11:6, Box) is a Snowflake work depicting a bondage theme, an acrylic on canvas. (103:15-18).

Exhibit 12 (E12:6, Box) is a work depicting a wiener with a nose and written on the back of the painting is "All men were meant to be pricks and smell their own asses. My shit don't stink." (103:19-24).

Exhibit 13 (E13:6, Box) is done by Snowflake and depicts a Russian mime and American wrestler done at the fall of the Berlin Wall. (104:1-3).

Exhibit 14 (E14:6, Box) is a leather and lace type depiction done by Tribblett, a well known gay artist from San Francisco. (104:8-14).

Exhibit 15 (E15:6, Box) is done by Snowflake, an oil on canvas self-portrait of the artist. (104:15-18).

Exhibit 16 (E16:6, Box) is a chalk pastel. (104:18-20).

Exhibit 17 (E17:6, Box) is a watercolor pastel of a nude male just posing. (104:25; 105:1-2).

Exhibit 18 (E18:6, Box) is the dance floor of the Ambush Bar in San Francisco, an oil on canvas. The Ambush Bar is a gay bar which conducts an art show once a month. (105:3-12).

Exhibit 19 (E19:6, Box) is another pastel watercolor of a nude male posing. (105:18-20).

Exhibit 20 (E20:6, Box) is a photograph of two fully clothed men in an embrace.

Exhibit 21 (E21:6, Box) is a sculpted panel portraying a naked man being pursued by a naked woman.

Exhibit 22 (E22:6, Box) depicts two naked men in a coital embrace, a portrait of the artist Snowflake and his lover.

All of the works were compatible and consistent with the theme of the Run Bar, being gay in nature. (109:1-10). The works in question were all displayed in the basement of the Run Bar. No one could see the works from Leavenworth Street. Mr. Tippit never attempted to sell any of the works. (106:1-8; 107:4-7).

Mr. Tippit received no complaints from any of his clientele or anybody else other than from Sergeant Cole, the police officer who seized the three paintings. (108:8-15).

Sergeant Cole visited the Run Bar on December 13, 1994 after receiving a complaint about possible pornography. (8:7-11). The complaint came from fire inspectors who had made an inspection of the basement in connection with certain remodeling. (11:5-9).

He arrived at the bar at 10:00 p.m. and asked for Terry Tippit. He explained to Mr. Tippit that he had received some complaints about drawings on the wall in the basement and wanted to look at them. (9:2-6). Sergeant Cole did not obtain a search warrant, and relied on consent although he did not obtain a Permit to Search Form. (12:1-14). There were three doors to the basement and Mr. Tippit was forced to unlock them by Sergeant Cole. (108:1-7).

After going in the basement of the Run Bar, Sergeant Cole observed some paintings, observed three that he believed violated the pornography laws of the State of Nebraska, seized those works and gave Mr. Tippit a receipt. The three works seized were represented by Exhibits 1, 2, and 3. (E1, E2, E3:6, Box). He observed no indication that any of the paintings in question were being offered for sale. (21:5-12).

Mr. Tippit intended to continue to display all of the works in question in the Run Bar if found not to be obscene. (33:18-25; 34:1-25; 35:1-25).

Sergeant Cole never cited *Hustler* magazine as being obscene, never issued citations for its sale or removed copies of *Hustler* magazine from the City of Omaha. (15:11-25; 16:1-12; E27:21, Box).

Martin Conboy was the City Prosecutor from Omaha, Nebraska and was given three allegedly obscene paintings seized from the Run Bar in November 1994 for possible criminal prosecution. (22:6-25).

As a result of discussions between himself and counsel for the Run Bar, it was agreed that a declaratory judgment action would be initiated to determine whether the paintings were obscene and that the Run Bar would not display certain of those paintings during the pendency of the action. (23:18-25; 24:1-18).

Other than the complaint from the fire department captains, he received no other complaints about the works. (26:9-13).

He was aware that *Hustler* magazine was sold in Omaha. (27:1-7). He had cable television and the Playboy channel which depicted nudity and simulated sexual relations. He had taken no enforcement action because in his opinion, the difference between actual sexual contact and simulated sexual contact was a crucial difference. (29:9-25; 30:1-16).

Roger C. Aiken, the Chairman of the Department of Fine and Performing Arts at Creighton University, was called as an expert witness by the Defendant. (44:22-25; 45:1).

He served as a curator for the Creighton Art Gallery for six years. An art gallery is a venue where works of art are displayed. A curator designates exhibits and chooses art work for exhibits. When he chooses an art work, he is principally looking for quality. (47:12-25; 48:1-24). He has served as a judge or juror to select works that would go

into an exhibit or to award prizes. He used his experience and training to choose what he thought were the best works. (49:16-25; 50:1-6).

He has dealt with obscenity in his contemporary art classes more as a censorship issue. (51:9-13). Obscenity is a political/social issue. Obscenity is not a word that is used in the art world. It has no significance. He did not intend to offer any expert opinion on the issue of obscenity. (52:2-11).

There are two or three ways to determine when an art work has serious artistic value. First is to look at the work of art itself, and does it have line, shape, color, form, balance. Was the work of art good or bad or somewhere in between. (54:18-25; 55:1-4). The second way is to look at the larger context of the work, to see whether the art was in a serious venue, whether it was in a refereed or juried context. Questions would include where the works had been, who's the artist, had it been purchased, by whom, and for what purpose. (55:5-25; 56:1-5).

He relied on the Institutional Theory of Art espoused by George Dickey in 1975. Under this analysis the importance of the venue is vital. He cited examples of acceptable exhibitions for displaying art as the Joslyn Biennial or the Whitney Biennial in New York. (57:1-22).

He opined that the works in question (E1-E22:6, Box) had no serious value as art. This was based mainly on the fact that the works were never displayed in an accepted venue, and that the location of where they were kept was an indication of their quality. (59:12-25; 60:1-10).

His four-corner analysis of Exhibit 1 (E1:6, Box), "kind of like a taste test," was that the work was lacking in the kinds of things he would like to see in a serious art work. In addition, since the work had not been in an appropriate venue, it had no value as art. Dr. Aiken also opined that the display of the works in a bar was extremely detrimental to the health of the art works. One does not mix alcohol, humidity and heat with art work and certainly do not hang art works on corrugated metal. Pool cues and art works don't mix. The Run Bar was the "worst environment for art work he has ever seen." The same conclusion would apply to Exhibits 2 through 22. (E2 through E22:6, Box). (60:14-25; 61:1-25; 62:1-19).

He opined that great art works existed in museums and galleries and not in bars. Venue is sort of an absolute index of a work's artistic value. An initial work with no track record under the Dickey analysis would lack serious artistic value and only become a serious art work after appearing in an appropriate venue which could occur over time. (62:23-25; 63:1-23).

Exhibits 1 through 3 (E1 through E3:6, Box) all lacked formal qualities that he liked to see in art works. (64:15-25; 65:1-25; 66:1-4).

He would only use the works depicted in Exhibits 1 through 22 in his class with respect to a discussion of obscenity. (67:19-23).

Dr. Aiken admitted that his opinion concerning the works themselves was ultimately subjective and that other art experts from across the country could have widely differing views. (68:14-25; 69:1-4).

The primary focus of the Dickey analysis was the venue question and until an art work was displayed in an appropriate venue, it never acquired serious artistic value. When Leonardo DiVinci finished the Mona Lisa, and sat on his easel completed, until it had been displayed at a venue that was appropriate, it lacked serious artistic value. This is true regardless of who sees the art work. (69:12-25; 70:1-25).

Dr. Aiken further opined that only one out of ten art works is found to have significant artistic value. The majority of pieces of art that he has viewed do not qualify as having serious artistic value and to that extent are no different than the exhibits in question. (71:8-25; 72:1-10; E1 through E22:6, Box).

Even if he observed a particularly attractive piece of art in terms of harmony, use of color, it would still have no serious artistic value until it appeared in an appropriate venue. He expected works that he liked to ultimately be displayed in an appropriate venue and thus achieve serious artistic value. (72:11-25; 73:1-25; 74:1-4).

He admitted that works of Robert Mapplethorpe had serious artistic value. (E29:78, Box; 77:1-25). He also admitted that additional sexually explicit work of Mapplethorpe possessed serious artistic value. (79:1-25; 80:1-17; E29; 81, Box). He admitted that nude paintings of Matisse, Modigliani, Michelangelo and Renoir all possessed serious artistic value. (81:22-25; 82:1-25; 83:1-10; 84:1-25; E30, E31, E32 and 33; 85, Box).

The works in question had the ability to achieve serious artistic value under Dickey's definition by being displayed in an appropriate forum or venue. (86:8-16).

A work of art that did not satisfy his criteria of serious artistic value was not therefore obscene, because there was relevance or relationship between the two concepts. (88:13-17).

There was no difference in the depiction of sexual explicitness between the works at issue and the works of Mapplethorpe which he considered to have serious artistic value. (89:19-23). He had no objection to labeling the works in question and at issue as art works. (92:13-20).

ARGUMENT

REASONS FOR GRANTING THE WRIT

I.

A WORK OF ART IS PRESUMPTIVELY NOT OBSCENE AND CANNOT BE FOUND OBSCENE UNLESS AND UNTIL ALL THREE PRONGS OF THE OBSCENITY DEFINITION IN *NEB. REV. STAT.* §28-807(10) (REISSUE 1989) ARE SATISFIED BEYOND A REASONABLE DOUBT.

This petition presents the Court with a First Amendment issue involving the use and reliance on expert testimony to determine whether the works lack serious literary, artistic, political or scientific value.

The Nebraska Supreme Court properly concluded that the burden of proof in a civil obscenity case brought under the declaratory judgment procedure set out in *Neb. Rev. Stat.* §28-820 is to have the government prove that the works in issue are obscene with proof beyond a reasonable doubt. 257 Neb. 219, 228.

Although the Court adopted this Court's three-part test enunciated in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), it did not properly apply those principles to the instant case.

The Court in its opinion did not articulate what the contemporary community standard was in order to analyze the works under *Miller v. California, supra.*

Contemporary community standards are set by what is in effect accepted in the community as a whole. *U.S. v. ABC, Inc.*, 952 F.2d 155, 156 (8th Cir. 1991), *cert. denied*, 502 U.S. 866, 112 S.Ct. 193, 116 L.Ed.2d 153 (1991). This determination is crucial. As a practical matter, before sexually explicit material can be determined to be obscene, a factual finding that the works offend "contemporary community standards" is required. Obscenity is not a matter of individual taste and the question is not how the material impresses an individual juror. Rather the test is how the average adult person of the community would view the material.

Materials, such as those in the instant case, may be viewed as indecent as opposed to obscene entitling them to constitutional protection. *Manual Enterprises v. Day*, 370 U.S. 478, 82 S.Ct. 1432, 8 L.Ed.2d 639 (1962). Certainly nudity and sexual depictions do not cause material to lose the protection of the First Amendment. Material does not evoke a prurient interest unless it has the capacity to provoke "sexual responses over and beyond those that would be characterized as normal." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985). Nudity is not necessarily obscene. *Jenkins v. Georgia*, 418 U.S. 153, 94 S.Ct. 2750, 41 L.Ed.2d 642 (1974).

Portrayals of sexual activity are not per se obscene, *Jacobellis v. Ohio*, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964), even if characterized by some as "dismally unpleasant, uncouth and tawdry." *Manual Enterprises, supra.*

A contemporary community standard can accept the private display of sexually explicit gay art in the community, even if 50, 60, 95 or more percent of the people would personally find such gay art potentially offensive and unappealing. If there is some small part of our population that finds such gay art neither appealing to their prurient interest nor potentially offensive, and if the larger percentage of our population accepts that the smaller percentage of our population should have the choice to view such gay art, then the community standard is such that it permits the presence of such gay art for display.

Defendant offered no evidence as to the community standard. Plaintiff elicited testimony from Defendant that cable television in the Omaha community routinely offered adult videos displaying nudity and simulated sex on Cinemax, Showtime and Playboy T.V. Mr. Conboy also acknowledged that various adult magazines were generally for sale in the Omaha area including *Hustler* magazine (E27; 16, Box) which depicted various sex acts between individuals including oral sex, anal intercourse, and the display of both male and female genital organs all of which establish the community's acceptance of sexually explicit materials. A cursory review of the contents of *Hustler* magazine displays without limitation male and female genitalia, oral sex, fellatio, and other sexual activities much more sexually provocative than

reflected in the works in the instant case. Significantly, the *Hustler* displays viewable by the public were intended to be sold commercially, while the art works in question were privately displayed and not for sale. Consistent with this theme, visual images are not stripped of First Amendment protection because they express sexual messages and ideas. *General Media Communications, Inc. v. Perry*, 952 F.Supp. 1072 (S.D.N.Y. 1997). Judge Amdor agreed that the applicable community standard is the Omaha metropolitan area relying on *U.S. v. Thomas*, 74 F.3d 701 (6th Cir. 1996) (App. 40).

The existing community standard allowed the presence of sexually explicit gay art on the following conditions:

1. The gay art does not depict violence in sexual relations.

2. The gay art does not depict sexual relations with children or family members.

3. The gay art does not depict sexual relations with animals.

4. The gay art is not available to minors.

5. The gay art is not displayed in a manner or place where they might be viewed, in whole or in part by non-consenting adults.

The evidence is uncontroverted that:

1. None of the works depict violence in sexual relations.

2. The works do not depict sexual relations with children or family members.

3. The works do not depict sexual relations with animals.

4. The works are not available for sale or capable of being observed by minors.

5. The works are not displayed in a manner or place where they might be viewed in whole or in part by non-consenting adults.

The uncontroverted evidence concerning the works in question is as follows:

- The works were displayed in the basement of the Run Bar with a locked door and no windows. There was no access to the public.
- The works were not for sale.
- The works were displayed in a gay bar with a predominately gay clientele.
- There were no complaints from the public.

The Court should have determined as a matter of law that the works did not violate the contemporary community standard and was not therefore obscene as a matter of law.

II.

THE COURT IGNORED FIRST AMENDMENT PROTECTION IN NOT FINDING THAT THE ARTWORKS POSSESSED SERIOUS ARTISTIC VALUE.

The third prong of the obscenity equation is whether a reasonable person would find that the works of art when taken as a whole, lack serious literary, artistic, political or scientific value. *Miller v. California, supra.* In

making this determination, the Court may consider whether the works were being commercially exploited for the sake of the materials' prurient interest. The evidence was undisputed that the works were not being commercially exploited for any reason.

This is the only component of the obscenity equation in which Defendant offered testimony in the form of Dr. Roger Aiken, associate professor of fine arts at Creighton University. The district court chose to adapt Dr. Aiken's opinions, and concluded that Exhibits 1, 2, and 3 (E1, E2, E3:6, Box) are "artistically valueless". (App. 42).

The Court erred in allowing Dr. Aitken's opinion to serve as the foundation that the works *as a whole* lacked serious artistic value.

The Court in its opinion, and particularly the concurrence intimated that the Plaintiff should have offered expert testimony. (257 Neb. 219, 234) Plaintiff did offer expert testimony, through the works of Robert Mapplethorpe (E29:78, Box; 77:1-25). The works of art created by Robert Mapplethorpe were far more sexually explicit than those at issue in the instant case. The *only* difference was that Mapplethorpe's works were exhibited in an art museum as opposed to those in the instant case.

The Court in its opinion established precedent that the determination of whether a work of art is obscene or entitled to First Amendment protection depended on where the work was displayed. The result is that an art work, admittedly obscene loses its obscene status when it is displayed in an appropriate forum but a work otherwise protected by the First Amendment does not enjoy

that protection unless in a proper forum. First amendment rights are too valuable and precious to be subject to the vagaries of location. Even Dr. Aiken admitted that only one out of ten art works is found to have significant artistic value. (71:8-25). This cannot possibly be the test contemplated by this Court in *Miller v. California, supra.*

While Dr. Aiken was qualified as an expert witness, and his testimony intellectually stimulating, it was for the most part irrelevant and immaterial to the issue at hand. Dr. Aiken conceded that a work of art that does not satisfy his criteria of serious artistic value is not obscene and stated: "Of course not. There's no relevancy. There is no relationship." (88:13-17).

Case law is clear that the determination under this component of the *Miller* test is not that of the art world but rather that of a reasonable person as distinguished from the determination made in the first two components under contemporary community standards. This issue was addressed cogently by this Court in *Pope v. Illinois,* 481 U.S. 497, 107 S.Ct. 1918, 95 L.Ed.2d 439 (1981). The Court declared that "there is no suggestion in our case law that the question of the value of an allegedly obscene work is to be determined by reference to community standards." The Court then concluded that:

> In *Miller* itself, the Court was careful to point out that '[t]he First Amendment protects works while, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the idea those works represent. Just as the idea a work represents need not obtain majority approval to merit protection,

> neither, insofar as the First Amendment is concerned, does the value of the work vary from community to community based on the degree of local acceptance it has won. The proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material taken as a whole.'

Unfortunately, Dr. Aiken's testimony was not that of a reasonable person, but rather whether a particular work of art achieved local acceptance. He testified that local acceptance or for that matter national acceptance depended entirely on the work being displayed in an appropriate forum. Therefore each of the works in question is on an identical level with every single great work of art in the history of art until and unless that particular work were displayed in an appropriate forum. Dr. Aiken admitted that his opinion was subjective. (68:14-23). The critical element for Dr. Aiken in determining whether a work had serious artistic value was whether it had been displayed in an appropriate forum. (70:1-14). Similarly every works created that has not been displayed in a proper venue lacks serious artistic value. (72:5-10). It is on that basis and that basis only that Dr. Aiken concluded that the works in question lacked "serious artistic value". This Court's acceptance of Dr. Aiken's opinion compounded the error by again focusing on his artistic expertise as opposed to the required reasonable person test.

Plaintiff submits that the "serious artistic value" contemplated by the obscenity standard is not that articulated by Dr. Aiken in the art world but rather whether a

reasonable person would find such value in the material. To that end, Dr. Aiken's testimony is irrelevant, of no evidentiary value to the Court, and an improper basis upon which a Court can rely in determining if a work is obscene. The decision is also at odds with *Neb. Rev. Stat.* §82-318(2) and *Neb. Rev. Stat.* §82-403 both of which define art to "mean the conscious use of skill, taste, and creative imagination in the production of aesthetic objects." Certainly the works at issue satisfy this definition of "art."

In the First Amendment context, an art critic's subjective evaluation based almost exclusively on where an art work was displayed is inconsistent with the *Miller* formulation for determining whether a work is obscene. Dr. Aiken admitted that the work of Robert Mapplethorpe had serious artistic value. (77:18-25; E29:78, Box). He further admitted that in terms of sexual explicitness, there appeared to be no difference between Exhibits 1, 2, and 3 and the Mapplethorpe works. Therefore, under Dr. Aiken's test, unless Exhibits 1, 2, and 3 were displayed in an accepted juried/refereed exhibit such as the Joslyn Biennial or Whitney Biennial in New York they lacked serious artistic value. (57:10-17). He further admitted that only one out of ten art works has significant artistic value. Under this scenario, a work of art, comparable in quality to that of Michelangelo, and depicting sexual explicitness, would be deemed to have no significant artistic value and thus not protected under the First Amendment. Extrapolating this argument to its ultimate conclusion, ninety per cent of works of art reflecting sexual explicitness have the potential to be declared obscene. Remarkably, a work that begins its journey as

"obscene" may, simply because it is displayed in a proper venue, be transformed from obscene to not obscene because it has developed "significant artistic value," not because of a reasonable person's determination but because of being displayed in an acceptable venue. An individual creating works of art should not have First Amendment protection depend on the vagaries of where the art work is displayed and the subjective beliefs of art experts.

The Court is then left with testimony from Mr. Tippit that the works in question were part of a large gay art collection that was displayed in San Francisco, California and included pencil drawings, pastels, and self-portraits by well known gay artists.

Dr. Aiken did not articulate whether a reasonable person would find the works to lack serious artistic value and Defendant adduced no additional testimony responsive to this prong of the *Miller* analysis. Accordingly, the Defendant effectively offered no evidence to satisfy the third prong of the equation beyond a reasonable doubt and the Court was not in a position to determine this prong on its own. As such no finding of obscenity could be made.

The works in question came before the Court with a presumption that they were not obscene. Defendant had the burden of proof to demonstrate that the works were obscene beyond a reasonable doubt. The evidence, and Defendant offered little, falls woefully short of satisfying that heavy burden of proof and resulted in an unconstitutional and unsupported conclusion that the materials were obscene.

The art works at issue come with a presumption of constitutional protection. Regardless of the dislike for the type of art displayed, the First Amendment does not provide any less protection to gay art than heterosexual art. The Defendant in this case has not satisfied its burden of proof to demonstrate that the works at issue were obscene, having failed to satisfy each of the three-prong test of *Miller v. California* and *Neb. Rev. Stat.* §28-807(10).

CONCLUSION

For all of the above reasons, Petitioner urges this Court to grant the Petition for Certiorari and upon consideration of the briefs and argument reverse the Nebraska Supreme Court.

Respectfully submitted,

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OPINION OF THE SUPREME COURT OF NEBRASKA

Case Title

Tipp-It, Inc., a Nebraska corporation, Appellant,
v.
Martin J. Conboy, City Prosecutor, Omaha, Douglas County, Nebraska, Appellee.

Case Caption

Tipp-it, Inc. v. Conboy

Filed July 9, 1999, No. S-98-096.

Appeal from the District Court for Douglas County: Michael W. Amdor, Judge. Affirmed.

Jeffrey A. Silver for appellant.

Alan M. Thelen, Assistant Omaha City Attorney, for appellee.

TIPP-IT, INC. V. CONBOY

Filed July 9, 1999. No. S-98-096.

1. Constitutional Law: Obscenity: Appeal and Error. In reviewing a fact finder's determination that certain material is obscene, the threshold duty of an appellate court is to conduct an independent review and determine, as a matter of constitutional law, if the material falls within the substantive limitations set forth in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973).

2. Obscenity: Appeal and Error. An appellate court must review the determinations of the trier of fact pursuant to the three-part obscenity standard set forth in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973).

3. ___: ___. An appellate court should give appropriate deference to the trier of fact regarding the "prurient interest" test and the "patent offensiveness" test, as these issues depend on knowledge of contemporary community standards which are uniquely within the province of the trier of fact.

4. **Judgments: Appeal and Error.** In a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless they are clearly wrong.

5. **Obscenity: Appeal and Error.** An appellate court should apply a de novo review in considering the third prong of the test in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), i.e., the value of the material at issue, since this determination does not depend upon community standards and is particularly amenable to appellate review.

6. **Appeal and Error.** In a de novo review, an appellate court reaches a conclusion independent of the trial court.

7. **Declaratory Judgments: Proof.** Basic civil jurisprudence indicates that the burden of proof in declaratory judgment actions is a preponderance of the evidence and the burden is to be borne by the plaintiff.

8. **Criminal Law: Proof.** It is the prosecution's burden in a criminal case to produce proof beyond a reasonable doubt of every element of a charged offense.

9. **Obscenity: Proof.** Proof beyond a reasonable doubt is the most appropriate standard in civil obscenity cases, instituted pursuant to Neb. Rev. Stat. § 28-820 (Reissue 1995).

10. Courts: Obscenity: Appeal and Error. In determining whether certain material is obscene, both trial courts and appellate courts must make a threshold determination that the material in question is within the range of materials which may be regulated.

11. Obscenity: Words and Phrases. Obscenity is defined as those materials which, taken as a whole, appeal to the prurient interest in sex; which portray sexual conduct in a patently offensive way; and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

12. Obscenity: Expert Witnesses. Expert testimony is not necessary to enable the trier of fact to judge the obscenity of material which has been placed into evidence.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

HENDRY, C.J.

I. PROCEDURAL HISTORY

Tipp-It, Inc., a Nebraska corporation, and Terry Tippit, the operator of the "Run Bar" (jointly referred to as "Tipp-It"), brought a declaratory judgment action pursuant to Neb. Rev. Stat. § 28-820 (Reissue 1995), seeking a judgment that certain putative works of art, namely exhibits 1 through 3, were not obscene within the definition of obscenity contained in Neb. Rev. Stat. § 28-814 (Reissue 1995). Martin J. Conboy, the Omaha City Prosecutor, filed an answer and counterclaim generally denying Tipp-It's contentions and affirmatively alleging that

the continued exhibition of the works constituted a public nuisance. After a bench trial, the Douglas County District Court declared exhibits 1 through 3 to be obscene. Tipp-It filed a notice of appeal and a petition to bypass. We granted Tipp-It's petition to bypass, *see* Neb. Rev. Stat. § 24-1106 (Reissue 1995), and now affirm.

II. FACTUAL BACKGROUND

Tipp-It operated a bar located at 1713-15 Leavenworth Street, Omaha, Nebraska, under the name "Run Bar." Tipp-It has operated the Run Bar since August 24, 1994, catering solely to a gay clientele. The Run Bar has a liquor license covering 1713-15 Leavenworth Street, including the main floor, a loft area, and a basement. The basement contains a full bar, chairs to sit on, and a pool table. The basement is utilized Thursday through Sunday by individuals over 21 years of age from 8 p.m. until 1 a.m. The primary activity of the Run Bar consists of socialization.

The works in question were displayed in the basement of the Run Bar. The matter in question came to light when local fire inspectors examined the basement of the Run Bar pursuant to Tipp-It's request for a certificate of occupancy. The fire inspectors complained to the Omaha Police Division regarding several works being displayed on the walls of the basement. On December 13, 1994, Sgt. Ronald Cole appeared at the Run Bar to investigate the complaint. Cole arrived at approximately 10 p.m., when the bar was open, and walked into the basement. Cole viewed various works displayed in the basement (22 total), seizing 3 works he suspected as violating the

obscenity laws for the State of Nebraska (exhibits 1 through 3).

As a result of subsequent discussions between Conboy and Tipp-It's counsel, the parties determined that a declaratory judgment action would be initiated to ascertain whether the works were obscene. The works depicted in exhibits 1 through 3 were then returned to Tipp-It with the understanding that the works would not be displayed pending a resolution of this action.

Tipp-It filed a petition for declaratory judgment on March 9, 1995, and the case proceeded to trial on May 5, 1997. The Douglas County District Court described the works in question as follows:

> (C) Exhibit 1 is a photograph of a drawing or sketch of eight, possibly nine men, all clearly adults. All are either naked or have exposed genitalia. Four of the men display penises which are erect and of exaggerated dimensions. One appears to have just completed anal intercourse with another man. Water or semen appears on the table or bench on which this man rests. In the lower right-hand corner a man appears to be undergoing anal penetration.
>
> (D) Exhibit 2 is a photograph of a drawing or sketch of two men, both of whom are naked and have erect penises which are of exaggerated dimensions. The man who [is] seated is performing fellatio on the man who is standing. Semen appears to be dripping from the mouth of the seated man. The standing man is wearing a Civil War-era cap. . . .
>
> (E) Exhibit 3 is a photograph of a display which is itself either a photograph or painting.

> In it, a bearded man appears to be undergoing anal penetration by a standing man who has a"Mohawk" haircut. . . .

The testimony adduced at trial was provided by Cole; Conboy; Tippit; and Dr. Roger Aikin, an expert witness. On December 29, 1997, the district court entered an order finding exhibits 1 through 3 obscene within the meaning of Neb. Rev. Stat. § 28-807(10) (Reissue 1995). The court ordered exhibits 1 through 3 to be surrendered to the Douglas County sheriff, destroyed, or removed from the state.

III. ASSIGNMENT OF ERROR

Tipp-It's sole assignment of error is that the Douglas County District Court erred in finding exhibits 1 through 3 obscene within the meaning of § 28-807(10).

IV. STANDARD OF REVIEW

The appropriate standard of review for obscenity cases was recently articulated in *State v. Harrold*, 256 Neb. 829, 593 N.W.2d 299 (1999).

In reviewing a fact finder's determination that certain material is obscene, the threshold duty of an appellate court is to conduct an independent review and determine, as a matter of constitutional law, if the material falls within the substantive limitations set forth in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), i.e., is the material the type of "hardcore" sexual material that may be constitutionally regulated under the First Amendment. Thereafter, the appellate

court must review the determinations of the trier of fact pursuant to the three-part obscenity standard set forth in *Miller v. California, supra*, and § 28-807(10). In so doing, the appellate court should give appropriate deference to the trier of fact regarding the first two prongs of the test, i.e., the "prurient interest" test and the "patently offensive" test, as these issues depend on knowledge of "contemporary community standards" which are uniquely within the province of the trier of fact. *State v. Harrold, supra.*

In a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless they are clearly wrong. *Hilliard v. Robertson*, 253 Neb. 232, 570 N.W.2d 180 (1997).

Finally, the appellate court should apply a de novo review in considering the third prong of the *Miller v. California test*, i.e., the "value" of the material at issue, since this determination does not depend upon community standards and is particularly amenable to appellate review. *State v. Harrold, supra.* In a de novo review, an appellate court reaches a conclusion independent of the trial court. *Eggers v. Rittscher*, 247 Neb. 648, 529 N.W.2d 741 (1995).

V. ANALYSIS

1. Burden of Proof

Before proceeding with our analysis under *Miller v. California, supra*, we note that this court has never directly determined the appropriate burden of proof to be applied in civil obscenity cases brought pursuant to § 28-820. The district court determined the appropriate burden was

proof beyond a reasonable doubt, stating that "given the issues of freedom of speech and freedom of expression at stake, and given that this proceeding arises under the criminal code, the defendant bears a burden of proving beyond a reasonable doubt that Exhibits 1 through 22, or any of them, are obscene." We agree.

Section 28-820 provides, in pertinent part,

> Any person who exhibits . . . or is about to exhibit . . . or is about to acquire possession with intent to exhibit . . . any work, material, conduct or live performance shall, if such person has genuine doubt as to the question of whether such work, material, conduct or live performance is in fact within the terms and provisions of sections 28-807 to 28-829, have the right to bring an action in the district court for declaratory judgment under the Uniform Declaratory Judgments Act against the appropriate chief law enforcement officer of the city . . . in which the work, material, conduct or live performance is located or is intended to be . . . exhibited, for a judicial determination as to whether or not such work, material, conduct or live performance is obscene.

Neither the text nor the legislative history of § 28-820 indicates the Legislature's intent regarding the appropriate burden of proof. *See Goolsby v. Anderson*, 250 Neb. 306, 549 N.W.2d 153 (1996). We must therefore construe § 28-820 in a fashion which avoids an absurd, unconscionable, or unjust result. *See State ex rel. Neb. Health Care Assn. v. Dept. of Health*, 255 Neb. 784, 587 N.W.2d 100 (1998).

Basic civil jurisprudence indicates that the burden of proof in declaratory judgment actions is a preponderance of the evidence and the burden is to be borne by the plaintiff. *See*, 2 Walter H. Anderson, Actions for Declaratory Judgments § 375 (2d ed. 1951); 22A Am. Jur. 2d Declaratory Judgments § 231 (1988 & Cum. Supp. 1999). At least one court has applied this standard in a civil obscenity case irrespective of the First Amendment issues involved.

In *Penthouse Intern., Ltd. v. Webb*, 594 F. Supp. 1186 (N.D. Ga. 1984), a magazine publisher brought a civil rights action against the county solicitor general seeking a declaratory judgment to enjoin enforcement of the state obscenity statute with respect to distribution of the magazine. The plaintiff argued that the materials were protected by a presumption of nonobscenity and that the presumption could be defeated only if the materials were found obscene beyond a reasonable doubt. The court rejected this claim and stated:

> On its theory, all plaintiff would have to do in its affirmative action for a declaratory judgment is to show that there is a reasonable doubt that the issues are obscene. Plaintiff thus wants to have its cake and eat it too: it wants to force [the state] to prove [its] case as a defendant instead of as a prosecutor, by the criminal standard instead of by a preponderance of the evidence, in a federal civil action instead of a state criminal prosecution.
>
> Plaintiff's suggestion is untenable. The Supreme Court has squarely held that the "beyond reasonable doubt" standard is not required in a civil proceeding concerning

> obscenity. *[California] v. Mitchell Brothers' Santa Ana Theater*, 454 U.S. 90, 102 S. Ct. 172, 70 L. Ed. 2d 262 (1981) (per curiam).
>
> Nor does the state bear the burden of proof. The state has not come into this court; plaintiff has. Because [the plaintiff] seeks affirmative and anticipatory relief . . . [plaintiff] must accept the burden that is placed on every civil plaintiff. The Court therefore holds that, as the party seeking relief, plaintiff must carry the burden of proof and meet the usual, preponderance-of-the-evidence standard for civil litigation.

Penthouse Intern., Ltd. v. Webb, 594 F. Supp. at 1195-96.

Despite the suggestion in *Penthouse Intern., Ltd. v. Webb, supra*, that the Supreme Court has squarely ruled on this issue, the Court's holding in *California v. Mitchell Bros.' Santa Ana Theater*, 454 U.S. 90, 93, 102 S. Ct. 172, 70 L. Ed. 2d 262 (1981), stands for nothing more than the proposition that the federal Constitution does not require the beyond a reasonable doubt standard to be applied in civil cases and that "while a State may require proof beyond reasonable doubt in an obscenity case, that choice is solely a matter of state law."

Unlike the court in *Penthouse Intern., Ltd. v. Webb*, we believe the better reasoned approach is to require proof beyond a reasonable doubt. We suggested as much in *Main Street Movies v. Wellman*, 251 Neb. 367, 368, 557 N.W.2d 641, 643 (1997), a declaratory judgment action brought pursuant to § 28-820, in which we stated, "As the issue here is whether the movies in question are obscene . . . we review this matter as a *criminal case at law*." (Emphasis supplied.) We have long held that it is

the prosecution's burden in a criminal case to produce proof beyond a reasonable doubt of every element of a charged offense. *See, e.g., State v. Jimenez*, 248 Neb. 255, 533 N.W.2d 913 (1995); *State v. Yelli*, 247 Neb. 785, 530 N.W.2d 250 (1995); *Peyton v. State*, 54 Neb. 188, 74 N.W. 597 (1898). We see no reason to treat civil obscenity cases differently.

In addition, imposing a burden of proof other than beyond a reasonable doubt would be inconsistent with the purpose of § 28-820. Section 28-820 was intended to provide plaintiffs with a mechanism to test the obscenity issue in a civil action prior to any exposure to criminal prosecution. If the burden of proof was merely a preponderance of the evidence, a finding of obscenity would be of minimal assistance to the issue of whether the material in question is criminally obscene. If such were the case, plaintiffs could gain little by instituting an action under § 28-820. Thus, a plaintiff would be disinclined to institute a declaratory judgment action if he or she may not be able to use the proceeding to evaluate the potential for criminal prosecution.

The Supreme Court has acknowledged the value of this approach to solving the vexing problem of reconciling state efforts to suppress sexually oriented expression with the prohibitions of the First Amendment.

> Instead of requiring the bookseller to dread that the offer for sale of a book may, without prior warning, subject him to a criminal prosecution with the hazard of imprisonment, the civil procedure assures him that such consequences cannot follow unless he ignores a court order specifically directed to him for a prompt and

> carefully circumscribed determination of the issue of obscenity.

Kingsley Books, Inc. v. Brown, 354 U.S. 436, 442, 77 S. Ct. 1325, 1 L. Ed. 2d 1469 (1957). "[S]uch a procedure provides an exhibitor or purveyor of materials the best possible notice, prior to any criminal indictments, as to whether the materials are unprotected by the First Amendment and subject to state regulation." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 55, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973).

Moreover, we believe the hazards to First Amendment freedoms, inhering in the regulation of obscenity, require that even in civil cases, the State must comply with the more exacting standard of proof beyond a reasonable doubt. Given the potential for erroneous judgments and the fundamental interests at stake in First Amendment cases, the fact finder must be almost certain that the materials are not constitutionally protected. The best way to guard against such a threat is to impose the most stringent burden, i.e., proof beyond a reasonable doubt. As Justice Brennan stated in his concurrence in *McKinney v. Alabama*, 424 U.S. 669, 685, 96 S. Ct. 1189, 47 L. Ed. 2d 387 (1976):

> The uncertainty of that line means that erroneous judgments as to whether material is obscene or not are likely in any event, and are particularly so if the factfinder is only marginally confident that the material falls on the unprotected side of the line. In light of the command of the First Amendment, a standard of proof by a mere preponderance of the evidence poses too substantial a danger that protected material will be erroneously suppressed. . . .

> [T]he possibility of an erroneous determination is heightened by the fact that the material may never be available to the public and thus need never have truly faced the acid test of acceptance under prevailing community standards. Furthermore, in light of the definition of obscenity – incorporating, as it does under current law, the notion of patent offensiveness to the average member of the community – there is an even greater need for the *judge* operating as sole factfinder to be convinced beyond a reasonable doubt that the material is obscene, for his determination is made without a jury's assessment of community values.

Equally as persuasive is the notion that the possible erroneous imposition of civil sanctions under the preponderance of the evidence standard simply creates too great a risk of self-censorship by those engaged in dissemination or display of materials pertaining to sex. Just as the improper allocation of the burden of proof "will create the danger that the legitimate utterance will be penalized" and may therefore cause persons to "steer far wider of the unlawful zone," *Speiser v. Randall*, 357 U.S. 513, 526, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958), the application of a preponderance of the evidence standard, rather than proof beyond a reasonable doubt, could cause affected persons to be overly careful about the material in which they deal. In this respect, Justice Brennan stated:

> The inevitable tendency of the preponderance-of-the-evidence standard – by forcing persons dealing in marginal material to make hard judgments as to whether such material is obscene in order to avoid civil sanctions – would be to limit the volume of at least the marginal material a

> bookseller could permissibly handle, and thus "restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly." [Citation omitted.] This "self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered."

McKinney v. Alabama, 424 U.S. at 686 (Brennan, J., concurring).

Having determined that proof beyond a reasonable doubt is the most appropriate standard in civil obscenity cases, instituted pursuant to § 28-820, we proceed in analyzing the works in question under *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973).

2. Obscenity

(a) Threshold Determination

The U.S. Supreme Court has indicated that both trial courts and appellate courts must make a threshold determination that the material in question is within the range of materials which may be regulated. *State v. Harrold*, 256 Neb. 829, 593 N.W.2d 299 (1999). That is, courts must initially determine, as a matter of constitutional law, whether the particular material is within the "substantive limitations" imposed by the First Amendment. *State v. Harrold, supra*. This review is intended " 'both to be sure that the [material] in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited.' " *Id.* at 842, 593 N.W.2d at 312 (quoting

Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984)). Accordingly, if we conclude, as a result of our threshold determination, that a work or material is within the range of patently offensive "hardcore" sexual material defined in *Miller v. California, supra*, the three-prong *Miller* obscenity test must then be utilized to determine if the material is outside the ambit of First Amendment protection.

In *State v. Harrold*, 256 Neb. at 850, 593 N.W.2d at 316, we stated that sexual conduct exceeding customary limits of candor could be considered "patently offensive." In *Miller v. California*, 413 U.S. at 25, the Court gave examples of the type of "sexual conduct" that may be regulated by state law:

> It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, *supra*:
>
> (a) Patently offensive representations of descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

Subsequent to the Supreme Court's decision in *Miller v. California*, the Nebraska Legislature proscribed the "patently offensive" depiction of certain acts of "sexual conduct," including "acts of . . . homosexuality, sodomy, sexual intercourse, or prolonged physical contact with a person's clothed or unclothed genitals. . . . " § 28-807(15).

As described by the district court, and viewed by this court, exhibits 1 through 3 clearly depict conduct involving sexual acts "define[d] for regulation" by § 28-807(10). Exhibits 1 through 3 depict sexual acts of sodomy, anal intercourse, and prolonged physical contact with a person's unclothed genitals. *See* § 28-807(10). We determine that the sexual acts depicted in exhibits 1 through 3 are within the range of "hardcore" materials as described by *Miller v. California*. Exhibits 1 through 3 depict ultimate sex acts, lewd exhibition of genitalia, ejaculated seminal fluid, and anal intercourse. Such depictions are clearly within the confines of *Miller v. California*. As the Supreme Court determined in *Hamling v. United States*, 418 U.S. 87, 115, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974), photographs in a brochure depicting heterosexual and homosexual intercourse, sodomy, ejaculated seminal fluid, and other sexual acts constitute a "form of hard-core pornography well within the types of permissibly proscribed depictions described in *Miller*."

We therefore conclude, as a threshold matter, that exhibits 1 through 3 qualify "as possibly obscene." *See State v. Harrold, supra. See, also, U.S. v. Various Articles of Obscene Merchandise*, 709 F.2d 132 (2d Cir. 1983). Having determined that exhibits 1 through 3 meet this threshold requirement, we proceed with our analysis under *Miller v. California, supra*.

(b) *Miller v. California* Obscenity Test

The Court in *Miller v. California*, 413 U.S. 15, 24, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), defined obscenity as those materials which, "taken as a whole, appeal to the

prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." Accord, *Smith v. United States*, 431 U.S. 291, 97 S. Ct. 1756, 52 L. Ed. 2d 324 (1977); *Jenkins v. Georgia*, 418 U.S. 153, 94 S. Ct. 2750, 41 L. Ed. 2d 642 (1974) (Brennan, J., concurring in result). Satisfying this definition involves a three-part conjunctive test. *State v. Harrold*, 256 Neb. 829, 593 N.W.2d 299 (1999).

First, a matter is not obscene under Nebraska law unless, taken as a whole, "an average person applying contemporary community standards would find that the work . . . predominantly appeals to the prurient interest or a shameful or morbid interest in nudity, sex, or excretion." § 28-807(10)(a). *See, also, Miller v. California, supra.* To decide this question of fact, the trier of fact must look to the work depicting sexual conduct as a whole to determine whether its dominant theme is one which goes substantially beyond customary limits of candor in appealing to a shameful or morbid interest in sex. *See, id.*; *Roth v. United States*, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957).

Second, even though a matter depicts hardcore sexual conduct, which appeals to the prurient interest, it is not obscene unless, taken as a whole, the work "depicts or describes in a patently offensive way sexual conduct specifically set out in sections 28-807 to 28-829." § 28-807(10)(b). As discussed above, the Court in *Miller v. California*, gave various examples of the type of sexual conduct that may be regulated by state law, and the Legislature took occasion to enumerate similar other acts

of "sexual conduct" which may be classified as patently offensive. *See* § 28-807(15).

Third, even though the material appeals to the prurient interest and is patently offensive, it cannot be obscene, constitutionally, unless the work, as a whole, "lacks serious literary, artistic, political, or scientific value." § 28-807(10)(c). Accord *Miller v. California, supra.* Material dealing with sexual conduct in a manner which advocates ideas, which contributes to or illustrates scientific discussion, or which adds to the general body of art and literature in our culture is protected by the 1st and 14th Amendments to the U.S. Constitution. *See Miller v. California, supra.* Therefore, appellate courts examine decisions on this third prong more closely in order to ensure that First Amendment protection of ideas, however unpopular, is maintained. *See Smith v. United States, supra.*

(i) Prurient Interest and Patent Offensiveness

We now turn to the first two prongs of the three-part *Miller v. California* test and consider (1) whether the average person, applying contemporary community standards, would find exhibits 1 through 3 appealing to the prurient interest, and (2) whether exhibits 1 through 3 depict, in a patently offensive way, sexual conduct specifically defined by the applicable state law.

The district court, sitting as the trier of fact, found exhibits 1 through 3 both appealing to the prurient interest and depicting sexual conduct in a patently offensive way. Based on the standard of review articulated in *State v. Harrold, supra,* we determine that the record amply

supports the district court's findings regarding the first two prongs of the *Miller v. California* test.

As described by the district court, exhibit 1 is a sketch or drawing of eight or nine men who are either naked or have exposed genitalia. Four of the men display erect penises of exaggerated dimensions, and one appears to have just completed anal intercourse with another man. Exhibit 2 is a sketch or drawing of two naked men, both of whom have erect penises of exaggerated dimensions. A seated man is performing fellatio on a standing man, and semen appears to be dripping from the mouth of the seated man. Exhibit 3 is a photograph or painting of a bearded man who appears to be undergoing anal penetration by another man.

The district court concluded the pictures "clearly appeal to the prurient interest and the representations of the figures in Exhibits 1, 2 and 3 appear to have been designed to shock the viewer and, indeed, to be offensive." Based on our review of the record and affording the appropriate deference to the trier of fact, we cannot conclude the district court was clearly wrong. *See, Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 253 Neb. 813, 572 N.W.2d 362 (1998); *Hilliard v. Robertson*, 253 Neb. 232, 570 N.W.2d 180 (1997).

(ii) Value of Works

We next turn to our de novo review of whether exhibits 1 through 3 lack serious literary, artistic, political, or scientific value. Tipp-It claims that the works in question, as "part of a large gay art collection that was displayed in San Francisco, California," including "pencil

drawings, pastels, and self-portraits by well known gay artists," possess serious artistic value. Brief for appellant at 22. We disagree.

The district court determined exhibits 1 through 3 lacked any serious artistic value and stated:

> If there is anything that keeps these three exhibits from being obscene, it is that they might be said to have some serious artistic value. It is here that Dr. Aikin's unrefuted opinions become significant. The Court finds credible his opinion that Exhibits 1, 2 and 3 are artistically valueless. The Court thus finds that the defendant has borne its burden of proof as to Exhibits 1, 2 and 3, and that the same are obscene.

The only expert witness called to testify by either party was Dr. Aikin. Dr. Aikin received his bachelor of arts degree from the University of Oregon in 1969 and his doctorate degree from the University of California at Berkeley in 1977, both in art history. He has taught art at Creighton University for 18 years, served as the director of the Creighton Art Gallery for 6 years, and also served as a curator for the Creighton Art Gallery for 6 years. Dr. Aikin is currently the chairman of the Department of Fine and Performing Arts at Creighton University.

Dr. Aikin testified that whether a particular work has serious artistic value can be determined either under a subjective, "four-corners" test by evaluating such criteria as space, composition, design, color, harmony, and form and balance, or under an objective "Dickey" analysis, which considers where the art has been exhibited as well as whether the work, or the putative artist, has achieved a

certain degree of respect and recognition in the artistic community. In Dr. Aikin's opinion, exhibits 1 through 3 do not possess any serious artistic value under either analysis.

Dr. Aikin initially analyzed exhibits 1 through 3 under the "four-corners" analysis, concluding that the works lacked "the kinds of things" or "any of the formal qualities" he deemed necessary to constitute serious artwork. When asked to evaluate the exhibits under the Dickey analysis, Dr. Aikin stated that in the absence of "any indication that these works have ever been part of a venue" or that "any serious value had accrued to th[em] as a result of an exhibition or a juried exhibition or a publication, or some kind of dispassionate, neutral judgment by the art world, I would have to say that th[ese] . . . have no value as art on that basis."

Expert testimony is not necessary to enable the trier of fact to judge the obscenity of material which has been placed into evidence. *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 56, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973) (stating that " '[i]n the cases in which this Court has decided obscenity cases since *Roth [v. United States*, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957)], it has regarded the materials as sufficient in themselves for the determination of the question' "). However, in other cases, courts have considered expert testimony in guiding their decisions regarding serious artistic value. *See, Luke Records, Inc. v. Navarro*, 960 F.2d 134 (11th Cir. 1992); *United States v. Ten Erotic Paintings*, 432 F.2d 420 (4th Cir. 1970).

Consequently, while we are not bound to accept Dr. Aikin's expert testimony, we find his unrebutted, uncontroverted testimony of assistance in our de novo review. Dr. Aikin concluded that exhibits 1 through 3 have no serious artistic value, regardless of the analysis employed. Pursuant to our de novo review of the record, and viewing the works in their entirety, we reach the same conclusion and find beyond a reasonable doubt that exhibits 1 through 3 lack any serious artistic value.

VI. CONCLUSION

Having considered Tipp-It's assignment of error and finding it lacking merit, we affirm the district court's December 29, 1997, order, finding exhibits 1 through 3 to be obscene.

AFFIRMED.

GERRARD, J., concurring.

I reluctantly concur in the result reached in the majority opinion. I write separately to articulate my views regarding the third prong of the test articulated in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), i.e., the "value" of the material at issue. As this determination does not depend upon community standards and is particularly susceptible to appellate review, an appellate court considering this issue conducts a de novo review and reaches a conclusion independent of that of the trial court. *See State v. Harrold*, 256 Neb. 829, 593 N.W.2d 299 (1999).

An appellate court's de novo review of the value of the material at issue is appropriate because the appellate

court is at least as qualified as the trier of fact to make such a determination. *See id.* While we may be as qualified as the trier of fact, we are not necessarily as qualified to determine the artistic value of a work as is an expert in the field of art, and we are often guided by testimony from such experts in our de novo review.

The trial court and the majority in this case rely upon the opinion of Dr. Roger Aikin, an acknowledged expert in the field of art. I find Aikin's testimony to be marginally persuasive regarding the "four-corners" analysis and not at all persuasive regarding his "Dickey" venue analysis. I do find Aikin's testimony, however, to be essentially uncontradicted, and his qualifications and the foundation for Aikin's opinion have not been challenged on appeal.

Because we are "in all respects confined to the record properly before us, limited to what was presented to the trial tribunal," *see Fremont Joint Stock Land Bank v. Harding*, 130 Neb. 842, 846, 266 N.W. 714, 716 (1936), I join in the judgment of the majority. Even though the appellate court conducts a de novo review, it is most helpful to have meaningful evidence in the record in order to conduct an insightful inquiry into the artistic value of the material at issue. It is not the proper role of an appellate court to become a "super expert," randomly imposing its opinion over those opinions properly admitted in evidence.

With that caveat, I must conclude, after a de novo review of the record before us, that the State met its burden of proving that the material at issue lacked serious artistic value. Hence, I concur.

MILLER-LERMAN, J., concurring.

Given the applicable standard of review and the record with which we are presented, I must concur.

IN THE DISTRICT COURT OF
DOUGLAS COUNTY, NEBRASKA

TIPP-IT, INC., A Nebraska Corporation, Plaintiff, MARTIN J. CONBOY, City Prosecutor, City of Omaha, Defendant.	DOC. 936 NO. 584 **FINDINGS OF FACT, CONCLUSIONS OF LAW, and ORDER OF JUDGMENT**

Trial of this case was held on May 5, 1997. At plaintiff's rest the plaintiff moved for a directed verdict, which was taken under advisement. Counsel were given leave to submit final authorities and the matter was then taken under advisement. Being fully advised in the premises, the Court herewith makes the following findings of fact and conclusions of law, and enters the following judgment:

I. FINDINGS OF FACT

1. This is an action for a declaratory judgment brought under the provisions of R.S. Neb. Sec. 28820, Reissue of 1995, which permits

> Any person who exhibits, sells or distributes, or is about to exhibit, sell or distribute or has in his or her possession with intent to sell or distribute, or is about to acquire possession with intent to exhibit, sell or distribute, any work, material, conduct or live performance . . . if such person has genuine doubt as to the question of whether such work, material, conduct or live performance is in fact within the terms and provisions

> of sections 28-807 to 28-829 . . . to bring an action in the district court against the appropriate chief law enforcement officer of the city . . . for a judicial determination as whether or not such work, material, conduct or live performance is obscene.

The defendant has counterclaimed for a declaratory judgment under the parallel provisions of R.S. Neb. Sec. 28-816, Reissue of 1995, which permit a city to obtain a judicial determination of obscenity.

2. Plaintiff Tipp-It, Inc., is a Nebraska corporation which does business as the Run Bar, 1713-1715, Leavenworth Street, Omaha, Douglas County, Nebraska. (Although the establishment is described as the "Run Bar" in the petition, it is referred to as "The Run" in Exhibit 26, the liquor license application, Reference in testimony was also to "The Run." Accordingly, reference in this order shall be to "The Run.")

3. Defendant Martin J. Conboy is the City Prosecutor of the City of Omaha, Douglas County, Nebraska, and as such is the chief law enforcement officer of the City of Omaha.

4. In its petition and in the testimony of Terry Tippett, a vice-president and owner of the corporation, The Run was described as catering to gay, i.e. male homosexual, patrons. (To avoid confusion, reference will be made to the corporate plaintiff as "the corporation" and Terry Tippett will be referred to as "Tippett").

> 5. **(A)** Exhibits 1 through 22 inclusive are photographs of certain drawings, sketches and paintings which were displayed or are presently displayed in the lower level of the corporation's

premises at 1713-1715 Leavenworth Street, Omaha, Douglas County, Nebraska. These exhibits will hereafter be collectively referred to as the "displays."

(B) Tippett testified that he came into possession of the displays from several friends and customers, and from art shows. He said that a majority of the displays were done by an artist known as "Snowflake," whom Tippett described as being known throughout the United States. Tippett said that each piece has a handwritten description on the back. Tippett testified that with Exhibits 1 through 22 he sought to present pieces of art in a variety of media, such as acrylics, watercolors, oils, pen, pencil and chalk.

(C) Exhibit 1 is a photograph of a drawing or sketch of eight, possibly nine men, all clearly adults. All are either naked or have exposed genitalia. Four of the men display penises which are erect and of exaggerated dimensions. One appears to have just completed anal intercourse with another man. Water or semen appears on the table or bench on which this man rests. In the lower right-hand corner a man appears to be undergoing anal penetration.

(D) Exhibit 2 is a photograph of a drawing or sketch of two men, both of whom are naked and have erect penises which are of exaggerated dimensions. The man who [sic] seated is performing fellatio on the man who is standing. Semen appears to be dripping from the mouth of the seated man. The standing man is wearing a Civil War-era cap. Tippett testified that this item was done by an artist named Sibley, whom Tippett said was well-known.

(E) Exhibit 3 is a photograph of a display which is itself either a photograph or painting. In it, a bearded man appears to be undergoing anal penetration by a standing man who has a "Mohawk" haircut. Tippett testified that this item is symmetrical in that it can be hung in any direction. Tippett also testified that this display is in fact made up of two pieces which are separate. Tippett said the display is not meant to show penetration.

(F) Exhibit 4 is a photograph of a painting which portrays a scene in bar. One man does not appear to be wearing a shirt and a sign on the wall says, "You don't have to be gay, but helps." Tippett said this display was placed near the pool table in the basement of the Run Bar. (See Para. 6 below.) Tippett testified that the bar scene portrayed in the display is the Ambush Bar in San Francisco.

(G) Exhibit 5 is a photograph of a painting which portrays a moonscape with an eclipsed planet in the sky. A block of stone and a steel beam appear in the foreground. In the background is the torso of a man which is clearly a sculpture. Tippett testified that this is a work by Snowflake.

(H) Exhibit 6 is a photograph of a painting which portrays two men playing pool. Both are fully clothed. Tippett testified that this is also a scene from the Ambush Bar.

(I) Exhibit 7 is a photograph of a painting which portrays an unclothed man in a seated position with head back and arm in lap. The genitals are not exposed. The painting is not otherwise explicit in form or detail. Tippett testified that this is a self-portrait by Snowflake.

(J) Exhibit 8 is a photograph of a display portraying a young, naked man who is clearly an adult. The penis is not erect. The display is bordered by leather belts. Tippett testified that this display was done by a pen artist named Noel.

(K) Exhibit 9 is a photograph of a painting which may be described as a fantasized sea- and city-scape. A Neptune-like figure, half-man and half-fish, with a fish-like penis, reaches for a full moon. Tippett testified that this is a work by Snowflake.

(L) Exhibit 10 is a photograph of a painting which portrays a naked man lying on planks of wood. The man's penis is not erect. In the sky above him is a male figure with long hair streaming away from the figure's face. On the horizon is Stonehedge [sic]. Tippett testified that this is a work by Snowflake.

(M) Exhibit 11 is a photograph of a painting which portrays two entwined figures. Tippett testified that this is a work by Snowflake with a "bondage theme."

(N) Exhibit 12 is a photograph of a painting which portrays a fantasized landscape. A figure displayed on a pedestal resembles a penis. Tippett testified that the figure on the pedestal appeared to be "a weiner with a nose and a butt." Tippett said that this display was to show that "all men are meant to be pricks."

(O) Exhibit 13 is a photograph of a painting which portrays two wrestlers in a ring. Tippett testified that this work by Snowflake, done in 1989, was intended to depict Russia and the

United States. Tippett described it as having a "Berlin Wall" theme.

(P) Exhibit 14 is a photograph of a painting or drawing which portrays two leather-garbed figures. Tippet said this work by Snowflake is entitled "Leather and Lace."

(Q) Exhibit 15 is a photograph of a painting which portrays a naked man in a sitting position. His genitals are not visible. Tippett testified that this is an oil painting, a self-portrait by Snowflake.

(R) Exhibit 16 is a photograph of a painting which portrays an Atlas-like figure crouching on the ground. His genitals are not visible.

(S) Exhibit 17 is a photograph of a painting which portrays a naked man with raised arms. His penis is not erect.

(T) Exhibit 18 is a photograph of a painting which portrays a group of men, all of whom are fully clothed. Tippett testified that this is a scene from the Ambush Bar.

(U) Exhibit 19 is a photograph of a painting which portrays a naked man kneeling on the ground with head raised and arms behind him. His penis is not erect.

(V) Exhibit 20 is a photograph of two fully-clothed men in an embrace. One man appears to be grabbing the crotch of the other. Tippett testified that this display is a self-portrait of the artist Snowflake.

(W) Exhibit 21 is a photograph of a sculpted panel which portrays a naked man being pursued by a naked woman. Tippett described this

display as "an Adam and Eve" thing that was "just filler."

(X) Exhibit 22 is a photograph of a painting which portrays two naked men in a coital embrace. One may be anally penetrating the other. Tippett testified that this painting, dated October 19, 1989, is a portrait of the artist Snowflake with his lover.

6. Tippett through the corporation purchased The Run bar on August 24, 1994. The liquor license covers only the main floor. Exhibit 26 is a certified copy of the corporation's liquor license application and contains detailed floor plans. The basement, or lower level, shown in photographs which are Exhibits 23 and 24, was described by Tippett as a "men's club" which is restricted to men only for the purposes of socializing and drinking. A bar, bar stools, and a pool table are visible in both exhibits, as are several of the items received as Exhibits 4 through 22. Tippett testified that the lower level was a men's club at all times relevant to this action.

7. Following the corporation's purchase of The Run, remodeling activities were undertaken on the premises. It was during remodeling that Exhibits 1 through 22 inclusive were placed on display in the lower level. Tippett testified that Exhibits 1 through 22 were all placed in the basement and none of them could be seen from the street. Tippett also testified that he has not offered to sell any of the displays which are Exhibits 1 through 22.

8. Plaintiff's petition asserts, Para. 4, that to obtain an occupancy permit, the premises had to be inspected by members of the City of Omaha Fire Division, and that such an inspection was carried out. This assertion is

relevant, though not essential, to an understanding of subsequent events. However, no proof was adduced regarding the inspection by the Fire Department and no express findings can be made.

9. City Prosecutor Martin J. Conboy (hereafter "Conboy") testified that he received a complaint about The Run in December, 1994, from two Omaha Fire Division captains. Conboy further testified that he met with the two and referred them to the Omaha Police Division. On cross-examination Conboy testified that prior to the complaint of the Fire Division captains, he had received no other complaints about The Run.

10. Sgt. Ronald B. Cole (hereafter "Cole") of the Omaha Police Division testified that in December, 1994, he was a member of the Division's Vice Squad, which he described as a unit which investigated prostitution, alcohol and cigarette violations, lewd acts in parks and "some pornography."

11. Sgt. Cole testified that on December 13, 1994, he and two other vice unit officers visited The Run regarding a complaint "about paintings on the wall" in the lower level. On cross examination he acknowledged that "the fire inspectors had been down there" and that they "thought OPD should take a took."

12. Sgt. Cole testified that on December 13, 1994, the bar was open. Sgt. Cole stated that he and the other officers asked Terry Tippett for permission to inspect the basement or lower level, and that Tippett did not object. Tippett was not asked to sign a "consent to search" form, nor did he. Tippett denied that he gave consent to the police. Instead, Tippett testified that the officers said,

"We're going to see the paintings" and that he had no choice in the matter. Tippett claimed that he was "forced" to unlock the basement. Tippett also testified that he had received no complaints about the displays.

13. Sgt. Cole testified that the a bar had just been built in the basement and that there were twenty paintings on the wall. Cole further testified that there were no windows in the basement and that a passer-by would not have been able to see Exhibits I through 22 inclusive.

14. Sgt. Cole testified that on December 13, 1994, he concluded that Exhibits 1, 2 and 3 were "in violation" of the pornography laws of the State of Nebraska. Exhibits 1, 2 and 3 were then confiscated by Sgt. Cole.

15. (A) Conboy testified that police came to him with photographs of Exhibits 1, 2 and 3 after they were confiscated. He was contacted thereafter by plaintiff's counsel who expressed concern as to how the originals were being stored.

(B) Conboy testified that he "would have prosecuted" regarding Exhibits 1, 2 and 3, but that a decision was made, apparently between Conboy and plaintiff's counsel, to seek an equitable determination of whether Exhibits 1, 2 and 3 are obscene. Following this agreement, Exhibits 1, 2 and 3 were returned to the plaintiff with plaintiff's agreement that they would not be displayed.

(C) When the Court inquired as to whether there was still a justiciable issue over Exhibits 1, 2 and 3, Tippett testified that if he was given Court authorization, he would display Exhibits 1, 2 and 3.

(D) Exhibits 4 through 22 inclusive were not seized and have remained on display in the lower level of The Run bar.

16. Exhibit 27 is a copy of "Hustler" magazine dated July, 1997. Sgt. Cole testified that he has cited no one for sale of "Hustler" magazine. Prosecutor Conboy testified that he "has contemplated" prosecutions of purveyors of "Hustler" for specific issues and not for the general content of "Hustler" itself.

17. On cross-examination, Prosecutor Conboy testified that the book "Sex" by the "celebrity" named "Madonna" can be checked out of the Omaha Public Library and that he has not prosecuted anyone as a result of that fact. Conboy also testified that he has not prosecuted the "shock rock" group "Marilyn Manson" for "acting out" sexual conduct on stage, nor has he prosecuted cable television providers for what is portrayed in their programming.

18. An assortment of exhibits were received in evidence which portray nudity in various settings. These include the following:

Exhibit 28, a book of photographic images by Robert Mapplethorp [sic];

Exhibit 29, photographic images by Mapplethorpe;

Exhibit 30, a book entitled *Matisse,* edited by Lawrence Gowing;

Exhibit 31, a document entitled "Glossary of Terms – For the Exhibition:

Michelangelo and His Influence – Drawings Rediscovered – Highlights of Italian Drawings"

Exhibit 32, a book entitled *Renoir Nudes*, text by Isabelle Cahn; and

Exhibit 33, a book of postcards entitled *Modigliani – 30 Postcards*.

19. Also received in evidence are two videos which portray nudity and sexual acts. They were purchased in Omaha and include the following:

Exhibit 34, a video recording entitled "Maid To Order;" and

Exhibit 35, a video recording entitled "Mega-Splash."

20. The future use of the lower level of the Run Bar is stated in plaintiff's answers, sworn October 21, 1996, to defendant's interrogatories: "Plaintiff intends to open the lower level of the bar to individuals over the age of 21 on Thursday, Friday, Saturday and Sunday from 8:00 p.m. to close and intends to continue to exercise its First Amendment rights to display the art collection." Tippett reiterated this intended use during his testimony at trial.

21. This Court has subject matter jurisdiction and jurisdiction of the parties.

II. EXPERT TESTIMONY

22. The only opinion testimony in the trial came from Dr. Roger Aikin, Chairman of the Department of Fine and Performing Arts at Creighton University. Hereafter referred to as "Dr. Aikin," he testified that he has

bachelors and masters degrees, and a doctor of philosophy degree in the history of art, all from the University of California at Berkeley. Dr. Aikin said his speciality is Renaissance and Baroque art, with an emphasis on the art and politics of papal patronage. He testified that he had been the curator of the Creighton University Art Gallery for six years, and that as such he designed exhibitions and chose the artwork to be included in those exhibitions. Dr. Aikin testified that he had also curated national exhibits and that he had been a consultant for Joslyn Art Museum in the past. His curriculum vitae appears as Exhibit 25. Dr. Aikin testified that he had dealt with "the obscenity issue" in classes on contemporary art, particularly with the topic of censorship.

23. Dr. Aikin was called as a witness for the defendant. He testified that he was retained to "appraise the serious artistic value" of Exhibits 1 through 22 inclusive. Dr. Aikin defined "serious value" meaning that which has weight and substance, and "more than a little bit of value." To determine artistic value, Dr. Aikin said he looked first at "the work inside the frame," the lines, shape, colors, form and balance. He said he next looked at the "larger context of the work," not merely whether he liked it, but rather an analysis that considered whether the work had been scrutinized by the art world. Dr. Aikin said this analysis would look at where the work had been displayed, whether it had been purchased by anyone, whether it had been published, and whether it had been included in art classes. Dr. Aikin said this process of evaluation was initiated in 1975 by one George Dickey and looked at the judgment tendered on a piece by "the art world." Dr. Aikin further testified that "venue," that

is, the place a work had been displayed, was one good indicator of artistic value. Dr. Aikin said that each piece of art starts out with no value, but that a piece can "achieve" value by being recognized, that it can be given "the stamp of approval."

24. Dr. Aikin testified that nudity can be serious art. He specifically mentioned Michelangelo and Picasso, and further testified that even the showing of sexual activity might be considered serious art.

25. As to Exhibits 1 through 22 in general, Dr. Aikin gave the following opinions:

> **(A)** Dr. Aikin testified that none of these displays were by recognized artists.
>
> **(B)** When asked on redirect examination if these displays had the potential to become serious works of art, Dr. Aikin testified that was "extremely unlikely" and "never that location" (e.g., The Run bar) because that venue "would not be taken seriously."

26. As to Exhibit 1, 2 and 3, Dr. Aikin gave the following opinions:

> **(A)** When asked on direct examination what serious value these displays had, Dr. Aikin testified "little or none." Dr. Aikin further testified that, using the Drickey [sic] analysis, they had no value.
>
> **(B)** Dr. Aikin testified that the location at which Exhibits 1, 2 and 3 were located "is a very revealing index into quality." Dr. Aikin said that "Poolcues and artwork don't mix," that the pieces were located "in the worst environment

for art I've ever seen," and that "you don't see great art in bars."

(C) Dr. Aikin testified that in a serious work of art one scrutinizes the use of space, the composition, the design, the "harmony" of the work, and the skill and talent of the artist in creating the work, what Dr. Aikin called "verisimilitude." As to Exhibit 1 specifically, Dr. Aikin then testified that it "has few of these qualities." As to Exhibit 1 specifically, Dr. Aikin said, "You know what you're looking at" but that the item had none of the other qualities of verisimilitude.

(D) As to Exhibit 2 specifically, Dr. Aikin testified that although the artist had some skill in rendering the anatomy, the work lacked "the formal qualities of serious art."

(E) As to Exhibit 3 specifically, Dr. Aikin testified that this work lacked the qualities of verisimilitude.

27. As to Exhibits 4 through 22 inclusive, Dr. Aikin gave the following opinions:

(A) Dr. Aikin testified that these displays were "derivative" in that they repeated earlier artistic styles without any originality of their own.

(B) Dr. Aikin also testified that none of Exhibits 4 through 22 inclusive achieved serious value; that he personally would include none of them in an art show; and that he would not use of any of them to teach art, except in a discussion of obscenity.

(C) Dr. Aikin testified on direct examination that of Exhibits 4 through 22 inclusive "some might not be out of place in a serious venue,"

and he specifically identified Exhibits 6, 7, 11, 15 and 17 in that category.

III. DISCUSSION AND CONCLUSIONS OF LAW

The beginning point of analysis in this case is the definition of obscene set out in R.S. Neb. Sec. 28-807(10). That provision states as follows:

> Obscene shall mean (a) that an individual person applying contemporary community standards would find that the work, material, conduct or live performance taken as a whole predominantly appeals to the prurient interest or a shameful or morbid interest in nudity, sex, or excretion, (b) the work, material conduct, or live performance depicts or describes in a patently offensive way sexual conduct specifically set out in sections 28-807 to 28-829, and (c) the work, conduct, material, or liver [sic] performance taken as a whole lacks serious literary, artistic, political or scientific value;

This provision is, of course, taken from *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 32 L.Ed.2d 419 (1973). It should here be noted that these provisions are conjunctive, that is, the requirements of all three must be met. Further, it is the conclusion of this Court that, given the issues of freedom of speech and freedom of expression at stake, and given that this proceeding arises under the criminal code, the defendant bears a burden of proving beyond a reasonable doubt that Exhibits 1 through 22, or any of them, are obscene.

The parties, in their briefs, assert different "communities" whose standards might apply in this case: plaintiff

says the community should be the Omaha metropolitan area, defendant says the community should be the entire State of Nebraska. No direct or opinion evidence was received regarding the community or the standards this Court should apply, nor was any direct or opinion evidence adduced as to whether or to what extent Omaha's standards might be different from standards anywhere else in the state. There was evidence that certain items ("Hustler" magazine, the book "Sex" by the "celebrity" "Madonna;" Exhibits 28 through 35 inclusive) are and were available in Omaha. Although a dubious predicate for a community standard, the fact that such items are available cannot be overlooked. For this reasons [sic], and considering the reasoning in *U.S. v. Thomas*, 74 F.3rd 701 (C.A. 6, 1996), this Court finds that the community in question should be the Omaha metropolitan area.

The simplest application of the criteria in R.S. Neb. Sec. 28-807(10) commences with subparagraph (b) for there is absolutely nothing in Exhibits 4, 5, 6, 13, 14, 16, and 18 which even remotely appeals to a prurient interest. Further, this Court has great difficulty in finding anything at all in these exhibits that could be dubbed "patently offensive" under subparagraph (c). These items are innocuous and there should be no controversy at all over them. The defendant has failed to meet its burden of proof regarding Exhibits 4, 5, 6, 11, 13,14,16, and 18.

As mentioned above, some of the displays do reveal nudity. However, many of these are quite unrevealing and this Court finds itself hard-pressed to see in Exhibits 7, 9, 12, and 21 any appeal to prurient interest or anything patently offensive. Accordingly, the Court finds that the

defendant has failed to meet its burden of proof regarding Exhibits 7, 9, 12, and 21.

Other items are more revealing, particularly in the display of frontal nudity of males. However, the Court finds itself again trying to discern the prurient and offensive in them. It is here that the community standard, such as it is, become [sic] noteworthy. With Exhibits 8, 10, 15, 17, and 19 there is presented nothing that is not visible in any of the other exhibits offered by the plaintiff to show what is available in Omaha, Douglas County, Nebraska. The prurient and the offensive arises in the eye of the beholder, if at all. This Court cannot conclude the defendant has met its burden of proof as to Exhibits 8, 10, 15, 17 and 19.

The same must be said about Exhibits 20 and 22. While these might arguably appeal to the prurient interest or be found patently offensive by some, they are bland when compared to, say, the Robert Mapplethorpe photographs. The Court again finds itself in the position of making a sort of crude value judgment based on a "standard" that is hazy at best: if the Omaha community allows "Hustler" magazine, what is there about Exhibits 20 and 22 that violates that community's standard? The answer is nothing at all, for the only legitimate conclusion to be drawn is that the defendant has not met its burden of proof as to Exhibits 20 and 22.

The only remaining exhibits in controversy are Exhibits 1, 2 and 3, and it [sic] here that that [sic] the case comes into much sharper focus. As this Court was hardpressed to ask why some of the above-described exhibits would be called obscene by any one, so too is the Court

hard-pressed to find how these exhibits would be tolerated in Omaha, Douglas County, Nebraska. To be sure, these exhibits depict scenes that are similar to those in several of the exhibits offered by the plaintiff from items readily available in Omaha. However, none of those items rise to the level of graphic sexuality portrayed in Exhibits 1, 2 and 3. These clearly appeal to the prurient interest and the representations of the figures in Exhibits 1, 2 and 3 appear to have been designed to shock the viewer and, indeed, to be offensive. If there is anything that keeps these three exhibits from being obscene, it is that they might be said to have some serious artistic value. It is here that Dr. Aikin's unrefuted opinions become significant. The Court finds credible his opinion that Exhibits 1, 2 and 3 are artistically valueless. The Court thus finds that the defendant has borne its burden of proof as to Exhibits 1, 2 and 3, and that the same are obscene.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED as follows:

1. The plaintiff's motion for directed verdict is overruled.

2. On the plaintiff's petition and the defendant's counterclaim, pursuant to the provisions of R.S. Neb. Secs. 28-807 through 28-829 inclusive, Exhibits 1, 2 and 3 are herewith declared obscene as that term is defined in R.S. Neb. Sec. 28-807(10).

3. On the plaintiff's petition and the defendant's counterclaim, pursuant to the provisions of R.S. Neb. Secs. 28-807 through 28-829 inclusive, Exhibits 4 through 22 inclusive are herewith declared not to be obscene at [sic] that term is defined in R.S. Neb. Sec. 28-807.

4. Pursuant to the provisions of R.S. Neb. Sec. 28-818, the plaintiff is herewith directed to either (A) surrender Exhibits 1, 2 and 3 to the Douglas County Sheriff for seizure and impoundment by the Court; (B) destroy Exhibits 1, 2 and 3; or (C) removed [sic] Exhibits 1 2 and 3 from the State of Nebraska. The plaintiff shall have thirty (30) days from the date of this order to elect whether to surrender, destroy or remove Exhibits 1, 2 and 3, that being the same period for the filing of an appeal. In the event of an appeal, Exhibits 1, 2 and 3 shall be surrendered to the Douglas County Sheriff within twenty-four (24) hours if [sic] the filing of an appeal. In any event, the plaintiff shall file a notice with the Court stating whether Exhibits 1, 2 and 3 have been surrendered, destroyed or removed from, the State, and shall serve a copy of such notice on the defendant's counsel.

5. Because plaintiff's petition asks only for a judicial determination of obscenity and does not ask for equitable relief against the defendant, none shall be granted.

Copies of this order shall be sent this date to counsel of record.

Dated this 29th day of December, 1997.

BY THE COURT:

/s/ Michael W. Amdor
Michael W. Amdor
District Judge

IN THE DISTRICT COURT OF
DOUGLAS COUNTY, NEBRASKA

TIPP-IT, INC., A Nebraska Corporation, Plaintiff, vs. MARTIN J. CONBOY, City Prosecutor, Omaha, Douglas County, Nebraska, Defendant.	DOC. 936 NO. 584 Assigned to Judge AMDOR PETITION FOR DECLARATORY JUDGMENT (Filed Mar. 09, 1995)

COMES NOW the Plaintiff and pursuant to Neb. Rev. Stat. 28-820 (Reissue 1989) seeks a judicial determination that certain material hereinafter identified is not obscene within the meaning of Neb. Rev. Stat. 28-814 (Reissue 1989) and in support thereof alleges and states as follows:

1. Plaintiff is now and has been for all times relevant hereto a Nebraska Corporation doing business in Omaha, Douglas County, Nebraska as the Run Bar at 1713-1715 Leavenworth Street, catering to the gay community.

2. From the time Plaintiff began its business through the present time, Plaintiff has attempted to be familiar with and comply with the laws of the State of Nebraska dealing with obscenity and specifically Neb. Rev. Stat. 28-814 (Reissue 1989).

3. Beginning after Plaintiff's purchase of the premises at 1713-1715 Leavenworth Street, Plaintiff remodeled an existing bar location in the lower level of the premises,

and in anticipation of the opening thereof, exhibited throughout the lower level bar a number of works of art from a well-renowned gay art collection consisting mainly of pencil drawings.

4. In anticipation of such opening and in compliance with the statutes of the State of Nebraska and ordinances of the City of Omaha, Plaintiff was required to obtain a certificate of occupancy which necessitated an inspection of the premises by members of the City of Omaha Fire Division. Such inspection was sucessfully [sic] completed and a certificate of occupancy issued.

5. However, on or about December 10, 1994, at approximately 10:00 p.m., three members of the City of Omaha Police Division's Vice Squad came to Plaintiff's business, and without a search warrant, demanded that they be allowed to view the as yet unopened lower bar area where the gay art collection was exhibited. Upon such viewing, the three City of Omaha Police Division Vice Officers photographed all of the art works, seized three specific pieces of the collection, advised Plaintiff that such pieces were obscene in violation of Nebraska law, and that Plaintiff would be criminally prosecuted. It was the Plaintiff's belief that it was not in violation of any obscenity laws. This incident was apparently triggered by complaints made by members of the City of Omaha Fire Division made during the inspection of the premises required by the application for the Certificate of Occupancy.

6. Pursuant to an agreement with Defendant, Plaintiff agreed to have the issue of obscenity concerning the three seized pieces of the art collection, or any part of the

art collection exhibited determined by the Court in lieu of any criminal prosecution. There is therefore a justiciable controversy between the parties.

WHEREFORE, Plaintiff prays for a judicial determination that neither the three seized pieces from the art collection, nor any part of the art collection as exhibited in Plaintiff's premises, are obscene within the meaning of Neb. Rev. Stat. §28-8154, 1943 (Reissue 1989).

TIPP-IT, INC., A Nebraska Corporation, Plaintiff

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ATTORNEY FOR PLAINTIFF

Supreme Court, U.S.
FILED
DEC 2 1999
CLERK

(2)

No. 99-614

In The

Supreme Court of the United States

TIPP-IT, INC., A Nebraska Corporation,

Petitioner,

vs.

MARTIN J. CONBOY, City Prosecutor
Omaha, Douglas County, Nebraska,

Respondent.

On Petition For Writ Of Certiorari To The Nebraska Supreme Court

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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ISM

QUESTION PRESENTED

Were the three works at issue obscene, as defined by Neb. Rev. Stat. §25-807(10) (Reissue 1995)?

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CONSTITUTIONAL AND STATUTORY PROVISIONS

First Amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Neb. Rev. Stat. §28-807(10) (Reissue 1995) provides:

> Obscene shall mean (a) that an average person applying contemporary community standards would find that the work, material, conduct, or live performance taken as a whole predominantly appeals to the prurient interest or a shameful or morbid interest in nudity, sex, or excretion, (b) the work, material, conduct, or live performance depicts or describes in a patently offensive way sexual conduct specifically set out in sections 28-807 to 28-829, and (c) the work, conduct, material, or live performance taken as a whole lacks serious literary, artistic, political, or scientific value.

Neb. Rev. Stat. §28-807(15) (Reissue 1995) provides:

> Sexual conduct shall mean acts of masturbation, homosexuality, sodomy, sexual intercourse, or prolonged physical contact with a person's clothed or unclothed genitals, pubic area, or buttocks or, if such person is female, breasts.

Neb. Rev. Stat. §28-820 (Reissue 1995) provides:

> Any person who exhibits, sells or distributes, or is about to exhibit, sell or distribute or has in his or its possession with intent to sell or distribute,

> or is about to acquire possession with intent to exhibit, sell or distribute, any work, material, conduct or live performance shall, if such person has genuine doubt as to the question of whether such work, material, conduct or live performance is in fact within the terms and provisions of sections 28-807 to 28-829, have the right to bring an action in the district court for declaratory judgment under the Uniform Declaratory Judgments Act against the appropriate chief law enforcement officer of the city, village or county in which the work, material, conduct or live performance is located or is intended to be disseminated, distributed, or exhibited, for a judicial determination as to whether or not such work, material, conduct or live performance is obscene. Any such action may be consolidated with a pending action brought under the provisions of sections 28-816 to 28-818, and the defendant in any action brought under this section may seek a declaratory judgment or request a temporary restraining order or an injunction therein in accordance with the provisions of sections 28-816 to 28-818.

STATEMENT OF THE CASE

Tipp-It, Inc. (hereinafter the "Plaintiff") filed the present action under Nebraska Revised Statutes §28-820 (Reissue 1995), seeking a declaratory judgment that certain art works were not obscene as defined by Neb. Rev. Stat. §28-807(10) (Reissue 1995). (Petition for Writ of Certiorari, Appendix p. 44). The petition was filed against Martin J. Conboy, City Prosecutor for the City of Omaha (hereinafter the "Defendant"). The Defendant filed an

answer and a counterclaim, seeking a declaratory judgment that the works at issue were obscene. (Pet. Cert. App. 26).

The parties had agreed that the obscenity issues should be adjudicated in a civil declaratory judgment action, rather than in a criminal prosecution. (Pet. Cert. App. 5) (23:16-24:11 in the Record).

The Plaintiff, through its Vice President Terry Tippit, operated The Run Bar in Omaha. (31:11-32:13). Plaintiff had a liquor license covering the main floor, the back yard/dance floor, the disc jockey booth, and the basement of The Run Bar. (36:18-39:3). The basement contained a full bar, chairs for people to sit on, a pool table, etc. (39:4-10). The basement is depicted in photographs, Exhibits 23 and 24. (E23 and 24, 1:6, Box). Plaintiff displayed the works at issue in the basement, and desired to continue to do so. (33:21-35:25; 105:24-106:1).

These matters came to light when fire inspectors inspected the basement pursuant to Plaintiff's request for a certificate of occupancy. (Pet. Cert. App. 31-32) (11:3-12). The fire inspectors complained to the Omaha Police Department Vice Unit regarding the paintings on the wall of the basement. (8:7-11).

On December 13, 1994, Sgt. Ron Cole of the Vice Unit appeared at The Run Bar to investigate the complaint regarding the artwork. (7:25-8:11). He arrived at about 10:00 p.m., when the bar was open, and walked into the bar. (8:12-18). Sergeant Cole viewed the art works in the basement, and seized three art works that he suspected to have violated the pornography laws for the State of Nebraska. (9:23-10:9). Those three works are depicted in

Exhibits 1, 2, and 3. (10:10-17) (E1, E2, and E3, 1:6, Box). The works depicted in Exhibits 1, 2, and 3 were returned to the Plaintiff, with the understanding that they would not be displayed pending resolution of this action. (24:2-18; 34:17-24).

This action was tried in district court on May 5, 1997. Prior to trial, the parties and the court discussed the nature of the case and what burden of proof would be applicable. The Defendant argued that each party should prove its own case by a preponderance of the evidence, as with any other civil case. (4:8-14). The district court ruled that the case was analogous to a criminal prosecution, and held that the Defendant would be required to prove that the materials were obscene, beyond a reasonable doubt, as in a criminal proceeding. (2:20-3:20; 4:15-23). The Plaintiff concurred with that ruling by the district court. (5:13-18).

At trial, Sergeant Cole, the Defendant Conboy, and Terry Tippit testified as to the aforementioned display, seizure, and return of the art works. The Defendant Conboy also described the resolution that resulted in the filing of this action. (23:16-24:11).

The only other trial testimony came from the Defendant's expert witness, Dr. Roger Aikin. Dr. Aikin was the chairman of the Department of Fine and Performing Arts at Creighton University. (44:25-45:1) (E25, 1:51, 51a). Dr. Aikin reviewed the photographs of the 22 subject works, with the intent of appraising what, if any, serious artistic value they had. (53:5-13).

Dr. Aikin described two ways of determining whether a certain work had serious artistic value. One

way would be to look within the "four corners" of the work itself and evaluate such elements of art as line, shape, color, form, and balance. If the work had "quality" in these elements it could have serious value. (54:15-55:4).

Dr. Aikin stated that a second way would be to look at the larger context of the work, and whether it was displayed in a "serious venue". (55:5-13). This contextual approach was conceived by an aesthetics professor named George Dickey, and focused on the "judgment of the art world" as to a work. (56:20-22). This resulted in a "reasonably objective judgment" in that the venue of the work was clear-cut. (56:23-25). Under this analysis, the venue of a work is of vital importance to its value. (57:10-58:1). This contextual approach has been accepted and used by art experts. (58:2-10).

Dr. Aikin opined that, based on the formal qualities within the four corners of the works, the subject works lacked any serious artistic value. (64:14-66:20). He would not personally advocate for the inclusion of any of the 22 works in an art exhibit in Omaha. (66:21-67:5). He would not use any of the works in teaching any of his classes, except perhaps in a discussion of obscenity. (67:19-22). There would be no reason to include any of the works in any art books or publications. (67:23-68:1). Dr. Aikin would be "very surprised" to see any of the works displayed in any serious art exhibition in Omaha. (68:2-5).

Similarly, Dr. Aikin stated, the works at issue fail the Dickey test of serious artistic value. After examining the venue of the display, as depicted in Exhibits 23 and 24, Dr. Aikin stated that he "would not consider these works of art as having any serious value". (61:24-62:2). He noted

that "[t]his is probably the worst environment for art works I've ever seen". (62:18-19). The venue caused Dr. Aikin "to question whether the owners of the work value them themselves". (62:12-14). He added that "pool cues and art works don't mix". (62:11-12).

Plaintiff did not present any expert opinion evidence as to serious artistic value. Plaintiff did offer, and the court did receive, over relevancy objections, Exhibits 28 through 33, consisting of various depictions of art works with themes of nudity. (E28-33, 1:78, 81, 85, Box). There is no evidence tying Exhibits 28 through 33 to any local contemporary community standards.

The district court also received, over a relevancy objection, a copy of Hustler magazine. (E27, 1:21, Box). Again, there was no evidence tying Hustler magazine to any contemporary community standards, other than the mere fact that the Defendant had not yet criminally prosecuted its sale, and it had not been "removed" from any Omaha bookstores. (16:10-12; 26:14-27:7).

Plaintiff also offered two videotapes as Exhibits 34 and 35, which were rejected as evidence by the court. (112:3-25) (E34 and 35, 1:112, Box).

In its December 29, 1997 judgment order, the district court found that the works depicted in Exhibits 1, 2 and 3 were obscene, and that the works depicted in Exhibits 4 through 22 were not obscene. Pursuant to Neb. Rev. Stat. §28-818 (Reissue 1995), the district court ordered that the works depicted in Exhibits 1, 2 and 3 be surrendered, removed, or destroyed. (Pet. Cert. App. 42-43). From that order, Plaintiff appealed to the Nebraska Court of Appeals. The Nebraska Supreme Court heard the case,

after ordering that the case bypass the Nebraska Court of Appeals. (Pet. Cert. App. 4). The Nebraska Supreme Court affirmed the trial court's decision (Pet. Cert. App. 1). Plaintiff now seeks a writ of certiorari from the United States Supreme Court.

ARGUMENT

I.

THIS CASE DOES NOT INVOLVE ANY IMPORTANT FEDERAL QUESTION REQUIRING REVIEW FROM THIS COURT.

This case involves the application of Nebraska's obscenity statute to three works sought to be displayed by the Plaintiff. There is no allegation that the Nebraska statute violates the United States Constitution. There is no allegation that any action of the Defendant violated the Constitution (Pet. Cert. App. 44-46).

United States Supreme Court Rule 10 describes the considerations governing the grant of writs of certiorari. Rules 10(b) and (c) involve certain decisions on "important federal question[s]". Rule 10 adds that a petition for a writ of certiorari is "rarely granted" for "erroneous factual findings or the misapplication of a properly stated rule of law".

The latter is the situation in the present case. Plaintiff at page 15 of its Petition for Writ of Certiorari argues that "[a]lthough the [Nebraska Supreme] Court adopted this Court's three-part test enunciated in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), it did

not properly apply those principles to the instant case". This alleged "misapplication" should not be the basis for the granting of a writ of certiorari.

Furthermore, the issues framed by the Plaintiff do not directly involve an important federal question. Plaintiff filed its petition for a declaratory judgment in Nebraska state court (Pet. Cert. App. 44). It sought a judicial determination under Neb. Rev. Stat. §28-820 (Reissue 1989) that certain works were not obscene under Nebraska's obscenity statutes. *Id.* There was no allegation that Nebraska's obscenity statutes were unconstitutional in any respect, and no allegation that the Defendant or his agents acted in violation of the Constitution (App. 44-46).

Indeed, the definition of obscenity under Nebraska statutes is similar to that enunciated by this Court in *Miller*. Nebraska's definition of obscenity is found at Neb. Rev. Stat. §28-807(10) (1995). That definition employs essentially the same three-prong definition as was stated in *Miller*. There apparently has been no reported case finding the latter statute to be unconstitutional, and petitioner does not appear to argue so.

In seeking grounds for this Court's review, Plaintiff does cite two grievances with the Nebraska Supreme Court opinion in this case. Those two grievances will be discussed in sections II and III below.

II.

THE NEBRASKA SUPREME COURT'S ALLEGED FAILURE TO "ARTICULATE" THE CONTEMPORARY COMMUNITY STANDARD IS NOT A BASIS FOR THE GRANT OF A WRIT OF CERTIORARI.

Plaintiff first argues that a writ of certiorari must be granted because the Nebraska Supreme Court allegedly failed to "articulate" the contemporary community standard. See Plaintiff's petition at pages i, 15. However, this argument misapprehends the proper role of the Nebraska Supreme Court as an appellate court.

As noted above, the three-pronged obscenity definition in Neb. Rev. Stat. §28-807(10) (Reissue 1995) closely tracks with the definition of obscenity pronounced in *Miller v. California*, 413 U.S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973). It is clear that the first "prurient interest" prong is to be considered with reference to contemporary community standards. See, Neb. Rev. Stat. §28-807(10)(a); *Miller*, 413 U.S., at 24, 37 L. Ed. 2d 419, 93 S. Ct. 2607. The finder of fact must also measure the "patently offensive" prong against contemporary community standards as well. *Smith v. United States*, 431 U.S. 291, 301, 52 L. Ed. 2d 324, 97 S. Ct. 1756 (1977). The fact finder's determinations of these two prongs are "essentially questions of fact". *Jenkins v. Georgia*, 418 U.S. 153, 159, 41 L. Ed. 2d 642, 94 S. Ct. 2750 (1974).

The contemporary community standards are to be applied by the triers of fact "in accordance with *their own understanding* of the tolerance of the average person in their community". *Smith*, 431 U.S. at 305 (emphasis added). In so doing, the triers of fact are to consider their

"entire community". *Id.* This is analogous to a juror's determination of what is "reasonable" conduct in the context of a negligence action:

> A juror is entitled to draw on *his own knowledge* of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law.

Hamling v. United States, 418 U.S. 87, 104, 41 L. Ed. 2d 590, 94 S. Ct. 2887 (1974) (emphasis added).

Thus, in the present case the trier of fact – the Douglas County District Court judge – was to resolve the first two prongs of the obscenity definition with reference to his own understanding of the contemporary community standards in his community. The trier of fact must rely on his own knowledge, and not on any "abstract formulation" of the contemporary community standard. *Jenkins*, 418 U.S. at 159. The trier of fact was to evaluate the subject works, with reference to his own understanding of the contemporary community standards, in the same way as a juror would evaluate the reasonableness of the actions of a motorist in a motor vehicle negligence action.

Most significantly, neither Neb. Rev. Stat. §28-807(10), nor *Miller* and its progeny, require the trier of fact to "articulate" or "announce" any specific definition of contemporary community standards. Again, the focus in an obscenity case is not to articulate or promulgate some "abstract formulation" of the contemporary community standards. Rather, the duty of the trier of fact is simply to

decide the case, with reference to his or her understanding of the contemporary community standards. Just as jurors in a motor vehicle negligence case are not required to state the basis for their decision, the trier of fact in an obscenity case is not required to write out a definitive statement of the contemporary community standards.

However, it is the Nebraska Supreme Court, and not the trial court, whom the Plaintiff faults for failing to "articulate" a contemporary community standard. A state court of last resort has even less of a duty to articulate or promulgate a contemporary community standard than does the trier of fact. If a state court of last resort were to formulate its own perception of the contemporary community standard, such a practice would effectively eviscerate the role of the trier of fact in considering his or her own understanding of the contemporary community standard. More specifically, the contemporary community standard, as understood by the Nebraska Supreme Court seated at the state capital in Lincoln, Nebraska, may well be different from the contemporary community standard understood by the trier of fact seated in the relevant locality in Omaha, Nebraska. The very nature of a contemporary community standard is antithetical to the de novo reformulation of the standard at the state supreme court level.

In *Smith v. United States*, 431 U.S. at 305, this Court listed some appropriate topics for appellate review in obscenity cases. It was noted that juries must be "instructed properly". *Id.* The type of conduct depicted must fall within the "substantive limitations" suggested in *Miller* and its progeny. *Id.* The work must lack serious

literary, artistic, political, or scientific value. *Id.* The sufficiency of the evidence could be reviewed. *Id.* This Court did not appear to suggest that it was appropriate for an appellate court to reformulate and articulate its own perception of the contemporary community standard. The Defendant is unaware of any such suggestion by this Court, and the Plaintiff does not appear to cite any such suggestion by this Court.

Grant of a writ of certiorari cannot be based on any supposed failure by the Nebraska Supreme Court to articulate a contemporary community standard.

III.

THE RELIANCE ON EXPERT TESTIMONY ON SERIOUS ARTISTIC VALUE DOES NOT REQUIRE THE GRANTING OF A WRIT OF CERTIORARI.

The Plaintiff's second argument is that the Nebraska Supreme Court allegedly improperly "reli[ed] on expert testimony to determine whether the allegedly obscene material lacked serious artistic value". Plaintiff's petition at page i. The Plaintiff argues that the Court's opinion "established precedent that the determination of whether a work of art is obscene or entitled to First Amendment protection depended on where the work was displayed". Plaintiff's petition at page 19. However, expert testimony on this issue was appropriate, and the Plaintiff misstates the precedential holding of the Nebraska Supreme Court.

This issue involves the third prong of the obscenity definition under Neb. Rev. Stat. §28-807(10) and *Miller*: whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. Expert testimony is

not necessary to satisfy this prong of the definition. See, *Hamling v. United States*, 418 U.S. 87, 105, 41 L. Ed. 2d 590, 94 S. Ct. 2887 (1974); *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 56, 37 L. Ed. 2d 446, 93 S. Ct. 2628, (1973). However, this does not imply that expert testimony is inadmissible or of no consequence. To the contrary, expert testimony as to serious artistic value is worthy of consideration by the trier of fact and by the appellate court. See, *e.g., Luke Records, Inc. v. Navarro*, 960 F.2d 134 (11th Cir. 1992).

In the present case, the only expert testimony was submitted by Dr. Roger Aikin, on behalf of the Defendant. Dr. Aikin was the Chairman of the Department of Fine & Performing Arts at Creighton University, and served in various capacities with the Creighton Art Gallery (Pet. Cert. App. 20). Dr. Aikin testified to two alternative methods of evaluating the serious artistic value of a particular work. One method was by a "four corners" test, evaluating such criteria as space, composition, design, color, harmony, form, and balance (Pet. Cert. App. 20). The alternative "Dickey" analysis considers where the art has been exhibited as well as whether the work, or the artist, has achieved a certain degree of respect and recognition in the artistic community (Pet. Cert. App. 20-21). Dr. Aikin testified that *under either analysis*, the three works at issue did not possess any serious artistic value (Pet. Cert. App. 21-22). Dr. Aikin's opinions were uncontradicted and were not objected to (Pet. Cert. App. 23).

The Nebraska Supreme Court found that while it was "not bound to accept Dr. Aikin's expert testimony", his testimony was "of assistance" in its de novo review of the

serious artistic value issue (Pet. Cert. App. 22). The Court did not say what aspects of Dr. Aikin's testimony were "of assistance".

In this context, it is impossible to say that the Nebraska Supreme Court opinion stands as precedent for the proposition that the serious artistic value issue can be determined by reference to where the work was displayed. The Court simply did not say that. The Court did not state which analysis or which part of Dr. Aikin's testimony was "of assistance". The Court could well have been guided by Dr. Aikin's comments under the "four corners" analysis. Indeed, the Court stated that the subject works "have no serious artistic value, *regardless of the analysis employed*" (Pet. Cert. App. 22) (emphasis added).

Similarly, there is no showing that the Nebraska Supreme Court deviated from the "reasonable person" standard discussed in *Pope v. Illinois*, 481 U.S. 497, 107 S. Ct. 1918, 95 L. Ed. 2d 439 (1981). Indeed, Dr. Aikin's testimony gave articulation to standards that could have been used by any reasonable person in an evaluation of the works. He supplied the "reasons" behind the thoughts of the "reasonable" person. It would not have been error to infer a relationship between the two, if that is in fact what the Nebraska Supreme Court did without saying so.

CONCLUSION

For the above reasons, the Defendant urges the Court to deny Plaintiff's petition for a writ of certiorari.

Respectfully submitted,

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